

BREAKING THE CHOKEHOLD: AN ANALYSIS OF  
POTENTIAL DEFENSES AGAINST COERCIVE  
CONTRACTS IN MIXED MARTIAL ARTS

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INTRODUCTION

The Ultimate Fighting Championship (UFC) is the world’s leading promotion company for the sport of mixed martial arts (MMA) and one of

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the most powerful organizations in contemporary athletics.<sup>1</sup> Much of the sport's popularity in the United States can be attributed to the UFC, and most fighters would give almost anything to earn a contract to professionally fight for the company.<sup>2</sup> As a result, the UFC has gained enough power to be highly selective and only sign contracts with fighters who are willing to sacrifice for the company, both inside and outside of the octagon.<sup>3</sup>

For instance, Jon Fitch, a successful fighter, had two fights remaining on his UFC contract when the promotion company dropped him for refusing to sign a lifetime Exclusive Promotional and Ancillary Rights Agreement (Ancillary Rights Agreement).<sup>4</sup> The purpose of the Ancillary Rights Agreement was to allow the UFC to use Fitch's name and likeness in an upcoming video game.<sup>5</sup> Additionally, the lifetime agreement prevented Fitch from ever working with another video game company, regardless of whether or not he still held a professional fighting contract with the UFC.<sup>6</sup> In return, Fitch would not have received any additional compensation other than "free publicity and promotion."<sup>7</sup>

Fitch had virtually no contractual bargaining power, and the UFC immediately dismissed his attempts to negotiate for a shorter term.<sup>8</sup> After his contract was terminated, Fitch asserted that he was not upset about the lack of compensation or the inability to work with another video game company.<sup>9</sup> Rather, he believed the most outrageous aspect of the situation was the coercive way in which the UFC presented the agreement for his signature, demanding that Fitch take the contract or lose his remaining fights in the

1. *The UFC*, UFC, <http://www.ufc.com/discover/ufc/index> (last visited Oct. 5, 2012).

2. See Stan Leung, *Big Brother Is the UFC: Jon Fitch Cut from His UFC Contract*, FIGHTING-MMA, <http://www.fighting-mma.com/articles/2008/big-brother-is-the-ufc.php> (last visited Oct. 5, 2012).

3. *Id.* The "octagon" is the caged "eight-sided specially-designed structure where all UFC bouts take place." *Glossary*, UFC, <http://www.ufc.com/discover/glossary/list#O> (last visited Oct. 5, 2012).

4. See Leung, *supra* note 2; Kevin Iole, *UFC Drops Fitch, AKA Fighters*, YAHOO! SPORTS (Nov. 20, 2008), <http://sports.yahoo.com/mma/news?slug=ki-ufcakafeud111908>; see also Kris Graft, *UFC's Fitch Talks Contract Dispute*, EDGE (Nov. 21, 2008, 10:47 PM), <http://www.next-gen.biz/features/ufcs-fitch-talks-contract-dispute>.

5. See Graft, *supra* note 4.

6. Greg Savage, *Update: UFC Talking with Fitch's Management*, SHERDOG (Nov. 20, 2008), <http://www.sherdog.com/news/news/Update-UFC-Talking-with-Fitchs-Management-15235>; see also Iole, *supra* note 4 ("We could die and they could make memorial figurines and stuff and make thousands, millions of dollars, and our families wouldn't see a penny of it." (quoting Jon Fitch)).

7. Savage, *supra* note 6 (quoting Jon Fitch).

8. Iole, *supra* note 4 ("We tried to negotiate five- or [ten]-year deals with them, but it wasn't good enough. It was all or nothing. He wanted our lifetime. He wanted our souls forever." (quoting Jon Fitch)).

9. See *id.*

UFC.<sup>10</sup> Feeling powerless and disrespected, Fitch refused to sign the life-time agreement.<sup>11</sup> The UFC immediately dropped him.<sup>12</sup>

Fitch was a well-known and successful fighter,<sup>13</sup> but UFC president Dana White made it clear that he was only willing to work with fighters who respected what he was trying to do for the company and for MMA.<sup>14</sup> White believes that these fighters are indebted to him because he awarded contracts to fighters like Fitch when the economy provided virtually no other opportunities for amateur mixed martial artists.<sup>15</sup> As harsh a reality as it

10. Savage, *supra* note 6 (“They basically kicked the door open, guns blazing, pointed it in our face and said, ‘Sign this or you’re going to pay.’”) (quoting Jon Fitch)).

11. Iole, *supra* note 4.

12. *Id.*

13. *Id.*

14. *Id.* (“There are a lot of guys who help us and work with us and are great partners with us, and they’re the ones we’re going to remember and take care of.”) (quoting Dana White)).

15. *Id.* (“Do these guys understand what is going on in this world? I’ll tell you, this economy is [expletive] up. It’s totally [expletive] up. It’s bad, real, real bad. . . . It’s a whole other world out there, believe me, and let these guys go out there and see what they find.”) (alteration in original) (quoting Dana White)). For a perfect example of the problems Dana White was referring to, look at ex-UFC fighter War Machine’s life. See generally *War Machine Going Back to Jail for Another Year*, UNDERGROUND, <http://www.mixedmartialarts.com/news/382322/War-Machine-going-back-to-jail-for-another-year> (last visited Oct. 5, 2012). War Machine, formerly known as Jon Koppenhaver, legally changed his name in 2008 when a wrestling federation copyrighted the nickname and prohibited the UFC from using it. Nichole Freshna, *UFC News: Jon Koppenhaver Legally Changes His Name to “War Machine,”* CAGE TODAY (Aug. 28, 2008), <http://www.cagetoday.com/ufc-news-jon-koppenhaver-legally-changes-his-name-to-war-machine>. War Machine held a UFC record of one and one when he was released for refusing a fight and publicly making inappropriate comments regarding the death of a former fighter. Sam Caplan, *Jon Koppenhaver Released by the UFC*, FIVE OUNCES OF PAIN (Sept. 12, 2008, 4:25 PM), <http://fiveouncesofpain.com/2008/09/12/jon-koppenhaver-released-by-the-ufc>. Following the end of his UFC career, War Machine had a brief stint in the adult film industry, but he could not stay out of trouble with the law. Dann Stupp, *Bellator Inks Polarizing Fighter War Machine*, MMAJUNKIE.COM (Dec. 7, 2011, 10:00 PM), <http://mmajunkie.com/news/26433/bellator-inks-polarizing-fighter-war-machine.mma>. War Machine was arrested numerous times on battery-related charges. *Id.* The Las Vegas Police Department issued a warrant for his arrest when he was “accused of beating and choking his girlfriend” at a fellow adult-actress’s birthday party. *Warrant Issued for War Machine*, UNDERGROUND, <http://www.mixedmartialarts.com/news/203083/White-still-interested-in-Nick-Diaz> (last visited Oct. 5, 2012). Subsequently, War Machine was involved in other bar fights and was arrested in San Diego, California. Dana Littlefield, *War Machine Headed for Stand Down in Jail*, U-T SAN DIEGO (July 1, 2010, 4:33 PM), <http://www.utsandiego.com/news/2010/jul/01/war-machine-headed-for-stand-down-in-jail>. After the arrest, he “pleaded guilty to two felony counts of assault with force likely to cause great bodily injury.” *Id.* As a result, War Machine was ordered to serve a year in county jail and was placed on three years’ probation. Dana Littlefield, *War Machine Gets Probation, Jail Time for Brawls*, U-T SAN DIEGO (Aug. 24, 2010, 3:59 PM), <http://www.signonsandiego.com/news/2010/aug/24/man-named-war-machine-gets-probation-jail-time-bar>. He was released in 2011, but found himself in front of a district court

may have been, Fitch recognized that he could not be a part of the world's largest MMA promotion company if he refused to agree to White's offer and sign the lifetime agreement.<sup>16</sup> A mere twenty-four hours after being dropped from the UFC, Fitch signed the lifetime agreement, and the UFC reinstated his contract.<sup>17</sup>

The UFC has earned so much market power since its creation in 1993 that it can demand and obtain its preferred contract terms.<sup>18</sup> As illustrated by Fitch's contract dispute, the UFC consequently gains even more control over fighters once they sign a contract.<sup>19</sup> The current bargaining structure is not sustainable because it increases the likelihood of a revolt by fighters against the promotion company. If the fighters rebel against the promotion company, they would likely seek an appropriate standard of fairness regarding contractual agreements between fighters and promoters.<sup>20</sup> Based on the potential goals of the sport, there are different ways to achieve contract reform that will further legitimize and improve the overall quality of the sport.<sup>21</sup>

Part I of this Comment discusses the history of MMA and how the UFC's dominance led to such extreme disparities in bargaining power between fighters and the promotion company. Part II explains how different sports and industries have historically dealt with coercive contracts. Finally, Part III concludes by analyzing the various alternatives and then determining which option is most appropriate for MMA based on the most reasonable amount of contract reform.

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judge for a sentencing hearing in early 2012. Matthew Roth, *War Machine Sentencing Hearing: Complete Transcript*, BLOODY ELBOW (Feb. 13, 2012, 7:13 PM), <http://www.bloodyelbow.com/2012/2/13/2796238/war-machine-sentencing-hearing-complete-transcript>. The sentencing was for a similar bar fight that he was involved in where he sent a bouncer to the hospital. *Id.* War Machine went into the hearing prepared to take a plea bargain, which would have required him to pay the bouncer's \$61,000 medical bill and extend his probation. *Id.* Instead, the judge explained that, as a trained fighter, War Machine is dangerous, and probation would not be acceptable. *Id.* Thus, War Machine was ordered to serve another year in prison. *Id.*

16. See Damon Martin, *24 Hours Later: Jon Fitch Back with UFC*, MMA WKLY. (Nov. 21, 2008), <http://mmaweekly.com/24-hours-later-jon-fitch-back-with-ufc-2>; Greg Savage, *Fitch Back in UFC Fold*, SHERDOG (Nov. 20, 2008), <http://www.sherdog.com/news/news/Fitch-Back-in-UFC-Fold-15249>; Savage, *supra* note 6.

17. Martin, *supra* note 16; Savage, *supra* note 6.

18. See Iole, *supra* note 4; *The UFC*, *supra* note 1.

19. See *supra* notes 4-17 and accompanying text.

20. See *infra* Part II.

21. See *infra* Part III.

## I. HISTORY OF THE ULTIMATE COMBAT SPORT

From its brutal past, MMA has evolved into one of the most popular contemporary spectator sports in the world.<sup>22</sup> Once classified as a bloody display that resembled a street fight more than an organized sport, MMA is now a respected sport with professional fighters who are among the most elite athletes in the world.<sup>23</sup> The modern-day roots of MMA reach far back to ancient Greek athletics, and from that time the sport has continued to evolve.<sup>24</sup>

### A. Origins of the Sport

In 648 B.C., the Greek warrior class practiced a primitive sport called “pankration.”<sup>25</sup> Unlike the popular sport of wrestling, where the object was to throw the opponent, the object of pankration was to continue fighting “until one of the two pankratiasts acknowledge[d] his defeat.”<sup>26</sup> Pankration fighters secured victories only when the other competitor became seriously injured or if he raised his hand and admitted defeat.<sup>27</sup> Although fatal accidents were rare, some of the competitions resulted in death.<sup>28</sup> Beginning in the thirty-third Olympiad and continuing for a millennium, pankration competitions were a popular spectator event.<sup>29</sup> The event continued to grow in

22. See *The UFC*, *supra* note 1.

23. See Brendan S. Maher, *Understanding and Regulating the Sport of Mixed Martial Arts*, 32 HASTINGS COMM. & ENT. L.J. 209, 216, 227 (2010).

24. See *The UFC*, *supra* note 1.

25. E. Norman Gardiner, *The Pankration and Wrestling*, 26 J. HELLENIC STUD. 4, 4 (1906); Jordan T. Smith, *Fighting for Regulation: Mixed Martial Arts Legislation in the United States*, 58 DRAKE L. REV. 617, 620 (2010).

26. Gardiner, *supra* note 25, at 4. Even this early form of MMA had its share of critics. *Id.* at 4-5. For example, the ancient Spartans were prohibited from competing in pankration because the object was to make one of the pankratiasts admit defeat, but the Spartans considered it a disgrace to admit defeat in any fashion. *Id.* at 4. Further, the Spartans believed such a brutish and unregulated activity was meant to train for warfare, and it “was not fit for an athletic competition.” *Id.* at 4-5.

27. See *id.* at 7; Smith, *supra* note 25, at 620. Few rules were enforced during competition, but an official was present to hit pankratiasts with a stick if they bit, gouged eyes, or scratched their opponent. Smith, *supra* note 25, at 620. When a competitor was seriously injured, he was considered “completely destroyed.” *Id.* (quoting 1 ANDREAS V. GEORGIOU, PANKRATION: AN OLYMPIC COMBAT SPORT, AN ILLUSTRATED RECONSTRUCTION 19-20 (2005)). Often, a pankratiast “completely destroyed” his opponent by breaking an opponent’s fingers, attempting to strangle an opponent to death, or twisting an opponent’s ankle out of its socket. Gardiner, *supra* note 25, at 7.

28. See Gardiner, *supra* note 25, at 12; Smith, *supra* note 25, at 620.

29. Smith, *supra* note 25, at 620.

popularity until Roman Emperor Theodosius outlawed the Olympic Games in the fourth century.<sup>30</sup>

The ancient form of fighting was disregarded until the 1920s, when a Brazilian form of mixed combat, known as vale tudo, resurrected interest in the ancient multidisciplinary competition.<sup>31</sup> Vale tudo involved various fighting styles, including mui-thai kickboxing, luta livre wrestling, boxing, and a new discipline called Brazilian jiu-jitsu (BJJ).<sup>32</sup> As venues regularly began to hold vale tudo matches, the new combat sport quickly became the second most popular sport in Brazil.<sup>33</sup> Members of the Gracie family began practicing BJJ based on judo, a Japanese martial art, and they used the new discipline to dominate vale tudo events.<sup>34</sup> As a result of the success of both vale tudo and BJJ, Rorion Gracie moved to the United States in 1980 to promote his family's martial art.<sup>35</sup>

## B. Mixed Martial Arts in America

Rorion Gracie taught BJJ in California until 1992 when he partnered with Art Davie and Bob Meyrowitz to establish the UFC.<sup>36</sup> At first, the UFC hosted MMA tournaments to find the most dominant fighting discipline in the world.<sup>37</sup> Similar to pankration and vale tudo, early UFC events had very few rules and lacked weight classes, time limits, rounds, or safety equipment.<sup>38</sup> Further, the UFC boasted about its "no-rules, anything-goes, judge-free competitions," which resembled caged street fights rather than organized sporting events.<sup>39</sup>

30. *Id.*

31. *See The UFC*, *supra* note 1. Vale tudo matches resembled those of ancient pankration because they were unregulated and often resulted in serious injury to the competitors. *See Smith*, *supra* note 25, at 620; Donald F. Walter, Jr., *Mixed Martial Arts: Ultimate Sport, or Ultimately Illegal?*, GRAPPLEARTS (Dec. 8, 2003), <http://www.grapplearts.com/Mixed-Martial-Arts-1.htm>.

32. Walter, *supra* note 31.

33. *Id.* According to ticket sales in Brazil, the only sport more popular than vale tudo was, and still is, futebol. *Id.*

34. *Id.*; Smith, *supra* note 25, at 620.

35. Walter, *supra* note 31.

36. *Id.*; *The UFC*, *supra* note 1.

37. *See The UFC*, *supra* note 1.

38. Walter, *supra* note 31.

39. Maher, *supra* note 23, at 216. The fighting tournaments were advertised as organized brawls that would showcase different fighting styles and determine which style was the most dominant. *Id.* The first event featured a match-up between a 425-pound amateur sumo wrestler and a 215-pound "savage" street fighter turned pro wrestler. Dave Meltzer, *First UFC Forever Altered Combat Sports*, YAHOO! SPORTS (Nov. 12, 2007), <http://sports.yahoo.com/mma/news?slug=dm-earlyufc111207>. The match ended thirty seconds into the first round when the street fighter kicked the teeth out of the sumo wrestler's mouth and then went on to brutally punch his face using his bare knuckles. *Id.*

The new UFC tournaments quickly gained rapid success and became the most watched non-boxing Pay-Per-View sporting events in history.<sup>40</sup> Unfortunately, the UFC's growing popularity also attracted backlash when politicians and lawmakers reacted to the violent and bloody nature of the sport.<sup>41</sup> Most notably, Senator John McCain of Arizona took the floor of the United States Senate in 1996, characterized the sport as "human cock-fighting," and urged the states to prohibit or ban the sport altogether.<sup>42</sup> As a result, nearly all fifty states enacted laws to regulate the contests and to prevent cable companies from broadcasting them, while thirty-six states banned the sport all together.<sup>43</sup>

In 2001, Zuffa, LLC bought the UFC for \$2 million and began to implement a set of unified rules and safety regulations designed to legitimize the sport and to save it from extinction.<sup>44</sup> With newly established credibility,

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40. Meltzer, *supra* note 39. The fourth event resulted in 240,000 Pay-Per-View sales. *Id.*

41. *Id.* A notorious VHS sleeve advertised that the event could be won by "knock-out, submission, or death." *Id.*

42. Smith, *supra* note 25, at 622 (quoting L. Jon Wertheim, *The New Main Event*, SPORTS ILLUSTRATED, May 22, 2007, at 54). McCain also referred to the sport as a "visual feast of broken bones and blood." *Health and Safety of Professional Boxing: Hearings Before the Comm. on Commerce, Sci., & Transp.*, 103d Cong. 68 (1994) (statement of Sen. McCain); see also Maher, *supra* note 23, at 217.

43. See Smith, *supra* note 25, at 622; Maher, *supra* note 23, at 217; L. Jon Wertheim, *The New Main Event*, SI.COM (May 22, 2007, 9:11 AM), <http://sportsillustrated.cnn.com/2007/more/05/22/ultimate0528/index.html>.

44. Smith, *supra* note 25, at 622; *The UFC*, *supra* note 1. Zuffa is the parent company of the UFC. Dave Meltzer, *Minority Interest Sold in UFC Parent Company*, YAHOO! SPORTS (Jan. 12, 2010), <http://sports.yahoo.com/mma/news?slug=dm-ufcsale011210>. The parent company owns a number of fighting organizations in addition to the UFC, such as Strikeforce, World Extreme Cage Fighting, and PRIDE. *UFC Purchases Strikeforce; UFC Boss Says Organizations to Operate Independently*, MMAJUNKIE.COM (Mar. 12, 2011, 6:30 PM), <http://mmajunkie.com/news/22807/ufc-purchases-strikeforce.mma>. Thus, fighters sign contracts with both Zuffa and whichever organization they will fight under. See *Zuffa Institutes Pre-Contract Drug Screening for Performance Enhancers*, YAHOO! SPORTS (Jan. 17, 2012, 3:22 PM), <http://sports.yahoo.com/news/zuffa-institutes-pre-contract-drug-202246404-spt.html>. Dana White, Frank Fertitta, and Lorenzo Fertitta created Zuffa upon purchasing the UFC, and it is the promotional company that handles all MMA business. *FIGHTING POLITICS* (Media Fly Creative 2010). White and the Fertitta brothers held a convention to establish a unified set of rules for the sport in an effort to urge states to legalize MMA once again. John Eligon, *A Boxing Regulator Changes Corners*, N.Y. TIMES, Nov. 24, 2006, <http://www.nytimes.com/2006/11/24/sports/othersports/24fight.html?pagewanted=all>. The convention took place in New Jersey, and those in attendance included mixed martial arts experts, doctors, and regulators. *Id.* Unlike the early days of the UFC, an emphasis was placed on strict rules and safety standards in an effort to improve the sport's reputation and distance it from the original aggressive promotional efforts that boasted about the sport's "no-holds-barred" attitude. *Id.* Among the new rules were "rounds, time limits, five weight classes, a list of [thirty-one] fouls, and [eight] possible ways to win." Walter, *supra* note 31. As a result, the Nevada State Athletic Commission eventually sanctioned the sport. Maher, *supra* note 23, at 218.

many legislators and regulators recognized MMA as a legitimate sport that was actually safer than boxing.<sup>45</sup> Currently, MMA is sanctioned in forty-five out of the forty-eight states that have sanctioning bodies.<sup>46</sup> Despite the fact that MMA is not nationally sanctioned in the United States, the UFC can rightfully take credit for legitimizing the sport and increasing its popularity throughout the world.<sup>47</sup> The UFC is now the world's leading promotion company for MMA and is the fastest growing sports organization in history.<sup>48</sup>

### C. The Coercive UFC Contract

The UFC's monumental success has provided the promotion company with an enormous amount of bargaining power, unmatched by any fighter

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45. Wertheim, *supra* note 43. All fifty states either approved or reviewed the Unified Rules of Mixed Martial Arts through a sanctioning committee. *Id.* Dr. Margaret Goodman, chairwoman of the Nevada State Athletic Commission's Medical Advisory Board expressed her opinion that MMA was safer than boxing because "[t]he guys [submit], and it's over. You don't have standing eight counts, you don't have [ten] rounds of guys taking shots to the head." *Id.*

46. See Matt Flegenheimer, *No Resolution for Mixed Martial Arts*, N.Y. TIMES, June 26, 2011, <http://www.nytimes.com/2011/06/27/nyregion/obstacles-in-push-to-legalize-mixed-martial-arts-in-new-york.html>. New York, Connecticut, and Vermont are the only states that do not sanction MMA, while Alaska and Wyoming do not have sanctioning bodies. *Id.* In 2011, a bill to legalize the sport in New York passed the State Senate for the second straight year, and for the second straight year the bill did not reach a vote before the Ways and Means committee. *Id.*

47. See *The UFC*, *supra* note 1.

48. *Id.* Its event coverage is translated into twenty different languages and is broadcasted to hundreds of millions of homes around the world in 149 countries and territories. *Id.* Every year the UFC produces thirty live events worldwide, twelve Pay-Per-View events, and the most successful and longest running sports reality television show "The Ultimate Fighter." *Id.* The UFC is not the only MMA organization in the world. Riley Kontek, *MMA's Best Developmental Organizations*, BLEACHER REP. (Feb. 13, 2012), <http://bleacherreport.com/articles/1064433mmas-best-development-organizations>. Many second-tier organizations are used as starting points for fighters who hope to someday sign a contract with the UFC. See *id.* There are countless organizations both in the United States and around the world. *MMA Organizations*, MMA-CORE, <http://www.mma-core.com/organizations> (last visited Oct. 5, 2012). While the UFC is the most dominant organization in America and most of the world, there are some Asian alternatives that may someday share comparable power. James Goyder, *Which Organization Will Become the UFC of Asia?*, BLEACHER REP. (July 20, 2011), <http://bleacherreport.com/articles/773254-which-mma-organization-is-set-to-be-the-ufc-of-asia>. Still, Dana White asserts, "I have no MMA rivals." Sergio Non, *MMA Power 10: It's a Zuffa World*, USA TODAY, June 21, 2011, [http://www.usatoday.com/sports/mma/2011-06-20-power-10\\_N.htm](http://www.usatoday.com/sports/mma/2011-06-20-power-10_N.htm). Further, White states, "My competition is the NFL. My competition is Major League Baseball. My competition is these other networks." *Id.* (quoting Dana White).



regardless of his success or status.<sup>49</sup> As a result, fighters have little protection from coercive, one-sided contracts, which they must sign if they want to fight for the UFC.<sup>50</sup> The UFC has adopted a “my way or the highway” approach to signing fighters.<sup>51</sup> The standard form exclusive fighter agreements heavily favor the UFC and Zuffa.<sup>52</sup> Fighters lack the essential bargaining power to change the terms of their agreements because the UFC has a virtual monopoly on MMA contests, and there is an unlimited supply of talented fighters willing to accept the UFC’s terms.<sup>53</sup>

Exclusive fighter agreements contain a number of provisions that allow the promoter to control the contractual relationship.<sup>54</sup> The general provisions in these standard form contracts disadvantage the fighters and put the promoter in the best possible position.<sup>55</sup> For instance, the exclusivity

49. See generally Leland Roling, *UFC Holds All the Power in Contract Negotiations with Dan Henderson*, BLOODY ELBOW (Sept. 15, 2011, 1:00 PM), <http://www.bloodyelbow.com/2011/9/15/2426983/ufc-dan-henderson-holds-all-the-power-in-contract-negotiations>.

50. See Geoff Varney, *Fighting for Respect: MMA’s Struggle for Acceptance and How the Muhammad Ali Boxing Reform Act Would Give It a Sporting Chance*, 112 W. VA. L. REV. 269, 299-300 (2009) (discussing how the Muhammad Ali Boxing Reform Act would prevent one-sided contracts if the Act applied to MMA). President Dana White has stated that fighters must “get with the program” and accept the terms of the contract or forget about fighting for the UFC. Iole, *supra* note 4.

51. Matt De La Rosa, *Historic MMA Rivalries, Part Four: UFC vs. Fighters*, BLEACHER REP. (Feb. 24, 2009), <http://bleacherreport.com/articles/128714-historic-mma-rivalries-part-4-ufc-vs-fighters> (explaining that the UFC is the biggest promoter in MMA and has the “luxury” of running its business based completely on its own preferences).

52. See *id.*

53. See *id.*

54. See Gary Wimsett, *Promotions and the Use of Exclusive Fighter Agreements in MMA*, FIVE OUNCES OF PAIN (May 19, 2009, 9:50 AM), <http://fiveouncesofpain.com/2009/05/19/promotions-and-the-use-of-exclusive-fighter-agreements-in-mma>.

55. See Varney, *supra* note 50, at 300; Wimsett, *supra* note 54. For example, the promoter’s business purpose is defined using broad terms that include general business practices and promotion of MMA events. *Id.* A common business purpose provision explains that the promotion company exists to “(1) produce and promote MMA events; (2) to reap the benefits of the live and recorded broadcast of such events through all forms of media; and (3) to monetize the manufacture and distribution of products relating to the produced and promoted events.” *Id.* On the other hand, the agreement is also made up of numerous provisions that specifically explain the rights and responsibilities of the fighter, including allocation of expenses and insurance costs. *Id.* Originally, both the fighter expenses and insurance provisions were written to heavily favor the promotion company. *Id.* They only took into account expenses and insurance necessary during the course of the event that was being promoted. *Id.* Fight related expenses are generally covered, including flight, hotel, and per-diem food allowances for the fighter and his cornermen. *Id.* The fighter is responsible for all other non-fight related costs in the course of his training and preparation. *Id.* Originally, the promotion company would provide the fighter with health and accidental death insurance, but only during the actual event. *Id.* The clause was extremely narrow and explained that the fighters were still personally responsible for their own medical expenses. *Id.* Recently, however,

provision binds the fighter to a restricted relationship with the UFC for an agreed upon term and specified number of fights.<sup>56</sup> Regardless of the term length in the agreement, the provision includes various termination and extension clauses that can be triggered at the promoter's discretion.<sup>57</sup> One of the most controversial extension clauses is the "Champion's Clause," which allows the promoter to extend the contract if the fighter wins a championship belt during the original term.<sup>58</sup> The "Retirement Clause" is often invoked only for top fighters seeking retirement, and it gives the UFC power "to retain the rights to a retired fighter in perpetuity."<sup>59</sup> Finally, the Ancillary Rights Agreement itself is not an extension provision, but rather a life-

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Zuffa began providing insurance policies for its fighters. Luan Madani, *UFC: Zuffa Offering Insurance to Fighters and How It Furthers the Sport*, BLEACHER REP. (May 19, 2011), <http://bleacherreport.com/articles/705950-ufc-zuffa-offering-insurance-to-fighters-and-how-it-furthers-the-sport>. The creation of the insurance policy was an enormous step toward continued legitimization of the sport because the policy covers all UFC and Strikeforce fighters at no additional cost. *Id.* The fighters may use up to \$50,000 in coverage per year even if they are not scheduled to fight in the near future. *Id.* As long as the fighter is under contract with Zuffa, the policy covers dental and life insurance, "doctor services, laboratory tests, emergency medical evacuation and physical therapy." *Id.* Contracting fighters will now be covered for injuries suffered during an event or throughout the course of training. *Id.*

56. Wimsett, *supra* note 54.

57. *Id.*

58. *Id.*; Kelsey Philpott, *Anderson Silva Looking to Avoid "UFC Champion" Clause?*, MMA PAYOUT (Aug. 11, 2009), <http://mmapayout.com/2009/08/anderson-silva-looking-to-avoid-ufc-champions-clause> [hereinafter Philpott, *Anderson Silva*]. The UFC's Champion's Clause states:

[I]f, at the expiration of the Term, Fighter is then UFC champion, the Term shall be automatically extended for a period commencing on the Termination Date and ending on the earlier of (i) one (1) year from the Termination Date; or (ii) the date on which Fighter has participated in three (3) bouts promoted by ZUFFA following the Termination Date ("Extension Term"). Any references to the Term herein shall be deemed to include a reference the Extension Term, where applicable.

Kelsey Philpott, *The Champion's Clause: An MMA Comparative*, MMA PAYOUT (Sept. 7, 2009), <http://mmapayout.com/2009/09/the-champions-clause-an-mma-comparative> [hereinafter Philpott, *Champion's Clause*].

59. Adam Swift, *Inside the Standard Zuffa Contract*, SHERDOG (Oct. 31, 2007), <http://www.sherdog.com/news/articles/Inside-the-Standard-Zuffa-Contract-9734>. The Retirement Clause states:

If at any time during the Term, Fighter decides to retire from mixed martial arts or other professional fighting competition, then ZUFFA may, at its election, (i) suspend the Term for the period of such retirement; (ii) declare that ZUFFA has satisfied its obligation to promote all future Bouts to be promoted by ZUFFA hereunder, without any compensation due to Fighter therefore; or (iii) elect to provide Fighter with notice of an Acceleration.

*Id.* Sub clause (i), which allows the UFC to indefinitely suspend the term, is generally reserved for top fighters. *See id.*

time agreement that requires the fighter to sign over rights to his “name, sobriquet, voice, persona, signature, likeness and/or biography.”<sup>60</sup>

Standard form Zuffa contracts are undoubtedly written to favor the UFC.<sup>61</sup> With far superior bargaining power, the promoter uses these agreements to control the contractual relationship with its fighters, while exploiting those athletes in a number of significant ways.<sup>62</sup> Some of the most blatant forms of exploitation involve extending contractual terms, terminating contracts, and forcing fighters to agree to terms requiring the indefinite forfeiture of their personal and professional rights.<sup>63</sup>

The UFC regularly uses broad termination provisions to end many agreements and drop fighters for any number of reasons.<sup>64</sup> For instance, the UFC may terminate a fighter’s contract for a loss, failed drug test, medical suspension, or wearing of an unapproved sponsor’s logo on a T-shirt during weigh-ins.<sup>65</sup> The UFC terminated fighter Matt Lindland’s contract after three consecutive wins, claiming that he showed a conflict of interest and breached his contract when he wore an unapproved T-shirt during weigh-ins.<sup>66</sup> According to Lindland, who was a top contender in the middleweight division, there must have been other motives for his termination because other fighters had similarly unapproved sponsors, but they were not terminated.<sup>67</sup> Nonetheless, the UFC stuck by its decision to make an example out of Lindland and refused to renegotiate a new contract with him.<sup>68</sup>

The Champion’s Clause is one of the most contentious extension provisions used to exploit MMA fighters.<sup>69</sup> The main purpose of the clause is to prevent the most talented fighters from leaving and joining alternative leagues.<sup>70</sup> Also, the clause limits the amount of bargaining power a fighter

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60. David Nelmark, *Intellectual Property Rights Under the Zuffa Standard Contract*, MMA PAYOUT (July 16, 2009), <http://mmapayout.com/2009/07/intellectual-property-rights-under-the-zuffa-standard-contract> (listing the general rights that a fighter must give up when he signs the contract).

61. Swift, *supra* note 59.

62. *Id.*

63. *Id.*

64. Wimsett, *supra* note 54.

65. *Id.*; Eric Foster, *Matt Lindland: UFC Refuses to Negotiate New Deal*, MMAJUNKIE.COM (Feb. 15, 2008, 7:00 AM), <http://mmajunkie.com/news/3750/matt-lindland-ufc-refuses-to-negotiate-new-deal.mma>.

66. See Foster, *supra* note 65; Scott Dryden, *The Triangle Choke: Matt Lindland Interview*, PROFIGHTING-FANS.COM, [http://www.profighting-fans.com/articles/matt-lindland-interview\\_010609.html](http://www.profighting-fans.com/articles/matt-lindland-interview_010609.html) (last visited Oct. 5, 2012).

67. Foster, *supra* note 65.

68. *Id.*

69. See Philpott, *Anderson Silva*, *supra* note 58; Philpott, *Champion’s Clause*, *supra* note 58.

70. Philpott, *Champion’s Clause*, *supra* note 58 (“[T]hey’re ‘self-fulfilling’ talent retention mechanisms.”).

may gain while he holds a championship belt.<sup>71</sup> Journalists who are familiar with MMA contracts have raised concerns regarding the issue of whether the clause would allow the UFC to extend the contract indefinitely if the fighter holds a championship belt at the end of each subsequently extended term.<sup>72</sup> At one point, Anderson Silva, a UFC middleweight champion, wanted to abandon his championship belt and move to a new weight class.<sup>73</sup> Rumors quickly spread that Silva's actions centered on a desire to leave the UFC at the end of his contract term to compete against boxing champion Roy Jones, Jr. in a boxing match.<sup>74</sup> Regardless of his true motivation, Silva's contract would have been automatically extended if he held his middleweight belt at the end of his agreed-upon term.<sup>75</sup> In such a situation, Silva would not be able to compete outside the UFC without first breaching his contract.<sup>76</sup>

Similarly, the UFC has opportunistically used the Retirement Clause against some of the sport's most respected and legendary fighters.<sup>77</sup> For top fighters seeking retirement, this provision gives the UFC the power to suspend the contract term for the entire period of the fighter's retirement.<sup>78</sup> In 2007, heavyweight champion Randy Couture, one of the most successful MMA fighters in the history of the sport, decided to depart from the UFC with two fights remaining on his contract.<sup>79</sup> Couture opted to leave the UFC when he realized he would not be able to fight Fedor Emelianenko, arguably the world's greatest fighter, as a member in the UFC.<sup>80</sup> The main reason Couture left the UFC, however, was because he perceived the UFC to lack any respect for its fighters generally or for Couture specifically.<sup>81</sup> In re-

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71. *Id.*

72. *Id.* The clause would likely be interpreted to mean that the UFC is limited to extending the contract term for either one year or three bouts. *Id.* If, however, "Term" is interpreted to include "Extension Term," then it is possible to conclude that the UFC holds the power to continuously extend the contract if the fighter holds a championship belt at the end of the original term and each subsequent extended term. *Id.*

73. Philpott, *Anderson Silva*, *supra* note 58.

74. *Id.*

75. *Id.*

76. *See id.*

77. *See* Swift, *supra* note 59.

78. *Id.*

79. *Id.* Couture decided to resign because he felt there was no one meaningful left for him to fight. Kevin Iole, *Couture Stuns MMA World with Retirement*, YAHOO! SPORTS (Oct. 11, 2007), <http://sports.yahoo.com/box/news?slug=ki-couture101107>. Couture was hoping to fight Fedor Emelianenko, but Couture resigned as soon as he heard that Emelianenko signed with a different promotion company. *Id.*

80. Josh Gross, *Update: Couture Talks UFC Resignation*, SHERDOG (Oct. 11, 2007), <http://www.sherdog.com/news/news/Update-Couture-Talks-UFC-Resignation-9455>.

81. *Id.* ("I'm tired of being taken advantage of, played as the nice guy and basically swimming against the current with the management of the UFC. . . . I don't need the problems. I don't feel like I get the respect I deserve from the organization.") (quoting Randy

sponse to Couture's resignation, the UFC elected to suspend the term of the exclusivity agreement for the extent of Couture's retirement.<sup>82</sup> UFC President Dana White claimed that Couture owed the UFC two more fights under his contract, while Couture argued that the contract ended at the conclusion of its eighteen-month term.<sup>83</sup> After the UFC filed a lawsuit against Couture for damages suffered as a result of statements that he made about the company, the two parties came to an agreement, and Couture returned to the UFC.<sup>84</sup>

Finally, the Ancillary Rights Agreement is the most controversial provision of the UFC standard form contract.<sup>85</sup> As noted above, the UFC terminated Jon Fitch's contract when he attempted to negotiate a ten-year limit on the scope of this term.<sup>86</sup> Once a fighter signs over these rights, he gives the UFC the perpetual and exclusive power to use them in any way it sees fit, including sublicensing the fighter's rights to a third party.<sup>87</sup> The hardships imposed by the Ancillary Rights Agreement are most obvious with respect to new fighters who sign with the UFC for an undercard bout in hopes of rising in the ranks of the promotion.<sup>88</sup> Although a single loss could allow the UFC to terminate the contract, the promotional agreement would still be in effect permanently.<sup>89</sup> The provision, therefore, allows the UFC to prevent a fighter from taking part in any self-promotion even after his career

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Couture)). Further, he explained that Dana White and Lorenzo Fertitta lied to him when they told him he was the number two paid athlete in the UFC. *Id.* Couture knew it was a lie because the UFC offered Emelianenko more for a signing bonus than Couture had ever been awarded for a fight. Jeff Cain, *Why Randy Couture Left the UFC*, MMA WKLY. (Oct. 25, 2007), <http://mmaweekly.com/why-randy-couture-left-the-ufc-2>. White told Couture that he controls him. *Id.* In a press conference, Couture expressed that the UFC paid fighters with bonuses "off-the-books," that it did not pay him a negotiated signing bonus, and that it mistreated many of its fighters. Adam Hill, *Couture Is Target of UFC Lawsuit*, LAS VEGAS REV.-J. (Jan. 26, 2009, 4:57 PM), <http://www.lvrj.com/sports/13794082.html>. To refute Couture's claims, the UFC produced financial documents to show that they paid out more money to Couture than he alleged in his previous press conference. *UFC Disputes Couture's Claims About His Pay*, MMA WKLY. (Oct. 30, 2007), <http://mmaweekly.com/ufc-disputes-coutures-claims-about-his-pay-2>.

82. Adam Swift, *Cuban's HDNet Fights Enters Couture-UFC War*, SHERDOG (Feb. 15, 2008), <http://www.sherdog.com/news/articles/Cubans-HDNet-Fights-Enters-Couture-UFC-War-11346>.

83. Cain, *supra* note 81.

84. See Christopher Bean, *Randy Couture: The Natural Icon*, PROFIGHTING-FANS.COM, [http://www.profighting-fans.com/articles/randy-couture-the-natural\\_010312.html](http://www.profighting-fans.com/articles/randy-couture-the-natural_010312.html) (last visited Oct. 5, 2012).

85. Nelmark, *supra* note 60.

86. See *supra* notes 4-17 and accompanying text.

87. Nelmark, *supra* note 60.

88. *Id.*

89. *Id.*

with the promoter is complete.<sup>90</sup> Further, a separate clause in the agreement prevents a subjected fighter from ever referring to himself as a “UFC fighter” or “using the term ‘UFC’ without written permission.”<sup>91</sup>

The exclusive fighter agreements are filled with broad and controlling language, giving the promoter numerous rights and privileges that the fighter cannot negotiate if he has any hope of being in the UFC.<sup>92</sup> Although the contract gives the promotion company a wide range of privileges, the UFC will not necessarily enforce all of the privileges in every situation.<sup>93</sup> Still, there is the chance that a court could find certain provisions within the contract unconscionable.<sup>94</sup> In that event, the promoter has covered itself with a severability clause.<sup>95</sup> Even though the contracts are heavily one-sided, a single fighter has no leverage to negotiate the terms, because there are thousands of others who are willing to sign anything for a chance to fight in the UFC.<sup>96</sup>

## II. COERCIVE CONTRACTS IN OTHER SPORTS AND INDUSTRIES

MMA has gained popularity faster than any other sport in history, but if the UFC does not address its issues with coercive exclusive agreements, fighters may take part in disruptive reform attempts following the path of many other sports and industries.<sup>97</sup> Reform efforts in similarly structured sports and industries provide potential models for fighters seeking solutions to contract inequities.<sup>98</sup> Though it may not be possible to completely satisfy

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90. *Id.* (noting that, in theory, “the UFC can . . . prevent you from being in a movie, making an action figure, doing a sports drink commercial, or even creating a website with a URL that uses your name”).

91. *Id.*

92. *See* Swift, *supra* note 59.

93. Nelmark, *supra* note 60.

94. *Id.*

95. Swift, *supra* note 59 (“[I]f any part of the contract is found to be ‘illegal, invalid, or unenforceable as to any circumstance,’ the entire contract would not be void as a result.”).

96. Nelmark, *supra* note 60.

97. *See generally* Steven Marrocco, *UFC Exec Lorenzo Fertitta on Potential Fighters’ Union: “That’s Up to Them,”* MMAJUNKIE.COM (June 4, 2010, 8:45 AM), <http://mmajunkie.com/news/19410/ufc-exec-lorenzo-fertitta-on-potential-fighters-union-thats-up-to-them.mma> (discussing the possibility of fighters forming a union in response to disputes between fighters and the promotion company). Sports have been plagued with reform attempts that cost the leagues dearly in terms of fan support and revenues. Daniel Bukszpán, *10 Game-Changing Pro Sports Lockouts and Strikes*, CNBC.COM (Mar. 8, 2011), [http://www.cnbc.com/id/41968930/10\\_Game\\_Changing\\_Pro\\_Sports\\_Lockouts\\_and\\_Strikes](http://www.cnbc.com/id/41968930/10_Game_Changing_Pro_Sports_Lockouts_and_Strikes) (explaining how strikes in Major League Baseball, the National Football League, the National Hockey League, and the National Basketball Association had negative impacts on the respective sports).

98. *See infra* Sections II.A-D.

all parties, greater awareness may highlight viable options for fighters while preventing the sport from progressing in the wrong direction.<sup>99</sup>

Similar to MMA, many other sports and industries operated, or still operate, on one-sided agreements.<sup>100</sup> For example, the origins of professional boxing, tennis, football, auto racing, and the entertainment industry are mired in a history of enforcing one-sided contracts.<sup>101</sup> Each of these sports and industries share similarities with MMA and can therefore provide a basic analysis of bargaining structure and contract reform.

#### A. NASCAR's Absolute Control over the Automotive Racing Industry

Much like the UFC's current structure, the National Association for Stock Car Auto Racing (NASCAR) uses a business plan that revolves around sanctioning and promoting events because it does not own racecars, racetracks, or drivers.<sup>102</sup> NASCAR has a unique legal structure that allows the organization to exercise strict control over all of its contracted drivers.<sup>103</sup> It is a privately owned corporation, like the UFC, and is controlled by Bill France and his family.<sup>104</sup> From its inception, auto racing grew in popularity, and NASCAR continued to gain power under its "benevolent dictator-

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99. See *infra* Sections II.A-D.

100. See *infra* Sections II.A-D.

101. See generally Kevin W. Wells, *Labor Relations in the National Football League: A Historical and Legal Perspective*, 18 SPORTS LAW. J. 93, 96 (2011) (discussing the history of labor relations in the National Football League and the players' union); Rick Smith, Note, *Here's Why Hollywood Should Kiss the Handshake Deal Goodbye*, 23 LOY. L.A. ENT. L. REV. 503, 506-08 (2003) (explaining the power that movie production companies have over all actors and actresses, and stating that there is little room for negotiation); S. Joseph Modric, *The Good Ole' Boys: Antitrust Issues in America's Largest Spectator Sport*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 159, 162 (2003) (detailing the structure of NASCAR as a private corporation that has strict control over all of its participants); Melissa Bell, *Time to Give Boxers a Fighting Chance: The Muhammad Ali Boxing Reform Act*, 10 DEPAUL-LCA J. ART & ENT. L. 473, 482 (2000) (explaining the coercive nature of boxing contracts); *How It All Began*, ATP WORLD TOUR, <http://www.atpworldtour.com/Corporate/History.aspx> (last visited Oct. 5, 2012) (noting that the Association of Tennis Professionals was formed when the athletes recognized their need for a players' association).

102. Modric, *supra* note 101, at 161.

103. *Id.* at 162.

104. *Id.* NASCAR was founded on February 21, 1948, in Daytona Beach, Florida. *Id.* at 161. In 1949, France sought to distinguish NASCAR from other stock car racing organizations, so he sanctioned the first "strictly stock" car race that featured production model cars. *Id.* The use of production model cars differed from other sanctioning organizations that promoted races with modified old model racecars. *Id.* France's race among production model cars laid out the framework for the model stock car racing industry. *Id.*

ship.”<sup>105</sup> Under a totalitarian framework, NASCAR has maintained complete control over everything that is affiliated with the organization.<sup>106</sup>

As a result of its increased power in the racing industry, NASCAR maintains complete control over its participants by enforcing strict punishments against anyone who attempts to challenge the organization.<sup>107</sup> For instance, the NASCAR organization once punished certain drivers by refusing to let them participate in a race when it subjectively determined that the drivers took part in “actions detrimental to auto racing.”<sup>108</sup> Specific rules are outlined in NASCAR’s rulebook, but the organization exercises great discretion in determining punishments based on the popularity of the driver or value of the corporate sponsor.<sup>109</sup>

NASCAR thwarted drivers’ attempts to gain more power over the organization through unionization.<sup>110</sup> The first attempt to form a drivers’ union resulted in NASCAR banning the only two union members from the sport.<sup>111</sup> Another effort to unionize took place in 1969, when the newly formed Professional Drivers’ Association (PDA) staged a boycott for safety concerns at the Talladega 500.<sup>112</sup> As a result, NASCAR brought in over thirty substitute teams to replace the boycotting drivers, and it allowed ticket holders to exchange their ticket for admission to a future event.<sup>113</sup> Following the boycott, NASCAR included a “good faith to the public pledge” in all of its entry forms.<sup>114</sup> The “pledge” increased NASCAR’s control over its drivers by requiring them to obtain both a substitute driver and written approval from a director before they could withdraw from a race.<sup>115</sup> Eventually, NASCAR’s control and financial influence from corporate sponsors destroyed the PDA.<sup>116</sup>

NASCAR’s absolute control over its participants raises antitrust issues.<sup>117</sup> Still, there are likely many reasons why antitrust claims remain non-

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105. *Id.* (quoting MARK D. HOWELL, FROM MOONSHINE TO MADISON AVENUE: A CULTURAL HISTORY OF THE NASCAR WINSTON CUP SERIES 16 (1997)) (explaining the overarching control that NASCAR management has over all of its drivers).

106. *See id.*

107. *See id.* at 162.

108. *Id.* (quoting HOWELL, *supra* note 105, at 23). NASCAR also emphasized the importance of loyalty within the organization when it punished drivers for competing in non-NASCAR sanctioned events. *Id.* at 163.

109. *Id.* at 162.

110. *Id.* at 163.

111. *Id.* at 164.

112. *Id.* at 164-65.

113. *Id.* at 165.

114. *Id.* (quoting HOWELL, *supra* note 105, at 46).

115. *Id.*

116. *See id.*

117. *Id.* at 170.



existent in NASCAR.<sup>118</sup> The most likely reason is that participants fear the organization's reputation for using extreme punishment in response to opposition and dissent.<sup>119</sup>

Nevertheless, one potential violation of the Sherman Antitrust Act could arise from NASCAR's organizational decisions and subjective enforcement of its rules.<sup>120</sup> The organization could face liability if it continues to change its rules unilaterally and arbitrarily, especially when it comes to safety issues.<sup>121</sup> In such a scenario, liability would be based on a Rule of Reason violation of Section 1 of the Sherman Antitrust Act.<sup>122</sup> Another potential issue for liability could stem from NASCAR's monopolization of the stock car racing industry.<sup>123</sup> Under Section 2 of the Sherman Antitrust Act, a violation could exist if a court determined that NASCAR possessed a monopoly power over the stock car racing industry and that it willfully acquired that power.<sup>124</sup> Based on NASCAR's absolute control that spreads across the geographic product market, a monopolization claim would likely be successful.<sup>125</sup>

While NASCAR enjoys absolute control over the stock car racing industry, a court could still potentially find that NASCAR operates in violation of the Sherman Antitrust Act.<sup>126</sup> As a result, the organization must continue to operate in a manner that keeps its participants relatively content.<sup>127</sup> It appears, however, that the organization will be safe as long as it maintains its reputation for strict punishment against opposition.<sup>128</sup>

## B. Federal Regulation over Coercive Boxing Contracts

Boxing and MMA are two combat sports that share a number of similarities in terms of history, state regulation, and the lack of a governing

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118. *Id.* Some potential reasons may be that "teams act as a family" or that sponsors settle disputes before they escalate. *Id.* Also, participants may recognize that the structure has worked for years and they do not want to disrupt it. *Id.*

119. *Id.*

120. *Id.* at 175; Sherman Antitrust Act, 15 U.S.C. § 1 (2006).

121. Modric, *supra* note 101, at 175.

122. 15 U.S.C. § 1. A Rule of Reason determination is based on a totality of the circumstances test that measures whether the questioned business practices promote or suppress market competition. *Antitrust: An Overview*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/antitrust> (last visited Oct. 5, 2012). A violation occurs when the business practice unfairly suppresses market competition. *Id.*

123. Modric, *supra* note 101, at 176.

124. *Id.*; 15 U.S.C. § 2.

125. Modric, *supra* note 101, at 177-78.

126. *Id.* at 178.

127. *See id.*

128. *Id.* at 170 ("[P]erhaps most likely, NASCAR's participants still fear the organization's wrath.").

body.<sup>129</sup> Most importantly, boxers were historically exploited because of their inability to protect their own rights and interests when contracting with managers and promoters.<sup>130</sup> Current MMA fighters face the same disparities and coercive relationships that boxers have dealt with for years.<sup>131</sup>

Similar to MMA, the boxing industry does not have an independent governing body, and there is no legitimate boxers' association or union to represent the boxers.<sup>132</sup> Originally, the average boxer did not have adequate bargaining power, but he was still required to sign a contract with a promoter if he ever wanted to compete.<sup>133</sup> However, the entire boxing industry is notorious for being filled with corruption, secret deals, and coercive contracts.<sup>134</sup>

Boxers sign a contract with a manager, who then signs additional contracts with promoters that then actually organize the fights.<sup>135</sup> Once signed to an exclusive contract, the boxer may only participate in fights that the promoter has arranged.<sup>136</sup> Thus, the business structure gives the promoter an immense amount of power and control over the boxer's entire career.<sup>137</sup> Rather than seeking the best possible fight for the boxer, the promoter has a much greater incentive to earn as much profit as possible.<sup>138</sup> Unfortunately, this reality means that the promoter is more likely to promote a fight between two fighters that are contracting with him, regardless of comparative skill level.<sup>139</sup> Prior to regulation, boxers were therefore more likely to sign with a promoter who held contracts with the greatest number of relevant fighters, which in turn only increased the promoter's power.<sup>140</sup> Promoters

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129. Varney, *supra* note 50, at 295 ("Both can trace their history to the ancient Olympics, both are regulated by the state athletic commissions, and neither have a centralized league or governing body regulating the sport.").

130. *Id.*; Bell, *supra* note 101, at 482.

131. Varney, *supra* note 50, at 295.

132. Scott Baglio, Note, *The Muhammad Ali Boxing Reform Act: The First Jab at Establishing Credibility in Professional Boxing*, 68 *FORDHAM L. REV.* 2257, 2264 (2000). Most of the major sports have a single governing body "that handles the day-to-day operations of the sport and 'provides for the planning, supervision, and control of corporate enterprise decisions.'" *Id.* (quoting PAUL D. STAUDOHAR, *PLAYING FOR DOLLARS: LABOR RELATIONS AND THE SPORTS BUSINESS* 8 (3d ed. 1996)). Independent governing organizations establish a unified set of rules for all competitors, and they maintain the general welfare of competitors and teams in order to increase public confidence in the sport. *Id.* at 2265.

133. *Id.* at 2269.

134. See Bell, *supra* note 101, at 482.

135. Arlin R. Crisco, Note, *Fighting Outside the Ring: A Labor Alternative to the Continued Federal Regulation of Professional Boxing*, 60 *OHIO ST. L.J.* 1139, 1144, 1147 (1999).

136. *Id.* at 1147.

137. *Id.*

138. *Id.* at 1147-48.

139. *Id.* at 1147.

140. See *id.* at 1148.

held a direct relationship with managers, which created financial incentives for both to find ways to use the boxers for as much profit as possible.<sup>141</sup>

In the past, powerful fight promoters basically controlled the entire boxing industry, and the disparities in bargaining power allowed them to offer boxing contracts that virtually eliminated any risk for the promoter.<sup>142</sup> The contracts often contained provisions that allowed the promoter to sign the boxer for an indefinite period of time and then extend the term at will.<sup>143</sup> Such a provision automatically limited a new boxer's bargaining power and forced him to stay under his initial contract for a term of two to four years, regardless of success.<sup>144</sup> If the new boxer then became successful, he would not be allowed to renegotiate his contract at the end of the initial term because the automatic extension provision would keep him under his initial contract for "the entire title reign plus two years beyond the date that the boxer los[t] the title."<sup>145</sup>

Additionally, promoters attempted to gain complete control over boxers by choosing a third party to serve as the manager or by forcing the fighter to represent himself and agree to all contract terms.<sup>146</sup> Much like athletes who want to fight in the UFC, the boxers did not have a choice other than to agree to the terms of one-sided contracts because promoters could easily refuse to promote or let them fight.<sup>147</sup> As a result of the coercive nature of boxing contracts, fight promoters were able to dictate a fighter's entire career based on subjective preferences.<sup>148</sup>

Boxers had little recourse available to combat the oppression from their promoters.<sup>149</sup> Some filed lawsuits, but most were either quickly settled or dismissed because plaintiff boxers could not afford to pay litigation costs or put their careers in jeopardy for a number of years.<sup>150</sup> Also, courts were generally reluctant or unable to provide redress for the boxers' claims in the

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141. Bell, *supra* note 101, at 483.

142. See Baglio, *supra* note 132, at 2269. Promoters even used their power to control the sanctioning committees that were in charge of ranking boxers to determine the best possible match-ups. Bell, *supra* note 101, at 483. The rankings were mainly subjective and were often determined based on personal preferences and influence from powerful promoters. See Crisco, *supra* note 135, at 1152-53. Thus, the sanctioning committee administrators had all the power to give preferred fighters title shots and bigger paychecks, rather than basing the determination on an objective skill rating. *Id.*

143. Baglio, *supra* note 132, at 2269.

144. *Id.*

145. *Id.*

146. *Id.* at 2271.

147. *Id.*

148. See *id.* at 2272-73.

149. *Id.* at 2273.

150. *Id.*

lawsuits that did make it to trial.<sup>151</sup> Historically, courts dismissed unconscionability claims against promoters because boxers were unable to show “deceptive or high-pressure tactics.”<sup>152</sup> As a result of the complete control promoters held over the boxing industry, they had the ability to offer contracts to boxers with any preferred terms; the boxers were forced to accept those terms if they wanted a chance to fight.<sup>153</sup>

In 1996, Congress passed the Muhammad Ali Boxing Reform Act (Reform Act) to combat the oppressive nature of the contractual relationships within the boxing industry.<sup>154</sup> The Reform Act is an amendment to the Professional Boxing Safety Act of 1996 (Safety Act).<sup>155</sup> The Safety Act established minimum health and safety standards for the boxing industry, whereas Congress passed the Reform Act to establish minimum safety requirements for boxers outside of the ring.<sup>156</sup> A predominant purpose of the Reform Act was to protect boxers from the promoters’ unethical business practices and coercive contracts.<sup>157</sup> One section of the Reform Act explicitly protects the boxer from coercive contracts.<sup>158</sup> That section was meant to

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151. *Id.* at 2273-74; *see also* *Trinidad v. King*, No. 98 CIV. 4518(LMM), 1998 WL 823653, at \*1 (S.D.N.Y. Nov. 24, 1998). In *Trinidad*, promoter Don King entered into a contractual relationship with International Boxing Federation world welterweight champion Felix Trinidad. 1998 WL 823653, at \*1. When the four-year term elapsed, Trinidad claimed that the contract expired, while King argued that he still held exclusive rights over the boxer for the reign of his title plus two years. *Id.* Trinidad sought a motion for a preliminary injunction so he could contract with another promoter. *Id.* In his motion, he argued that ambiguous terms must be interpreted against the drafting party. *Id.* at \*9. The court said he did not show a likelihood of success on the merits, but he presented questions of fact that could be answered at trial. *Id.* at \*9-10. Rather than continue with litigation, wasting time and money, he agreed to remain under contract with King so that he could continue to fight. Baglio, *supra* note 132, at 2274.

152. Baglio, *supra* note 132, at 2274; *see also* *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 780 (S.D.N.Y. 1990). In *Douglas*, heavyweight champion James Douglas claimed that his promotional contract with Don King should have been declared void because King had such control over promotion of the weight class that Douglas had no choice but to sign a contract with him. 742 F. Supp. at 780. Thus, Douglas claimed he was forced to sign the contract with any terms that King wanted. *See id.* The court opined that “[w]ithout some definite allegation of a defect in the contract negotiation process apart from King’s stature in the boxing field, which alone does not suggest ‘inequality so strong and manifest as to shock the conscience and confound the judgment,’” Douglas did not make the required showing of unconscionability in the bargaining process. *Id.* at 781 (quoting *Christian v. Christian*, 365 N.E.2d 849, 855 (N.Y. 1977)).

153. Baglio, *supra* note 132, at 2275.

154. Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6302 (2006).

155. Professional Boxing Safety Act of 1996, 15 U.S.C. § 6301 (2006).

156. *See* Cristina E. Groschel, Note, *Down for the Count: The Muhammad Ali Boxing Reform Act and Its Shortcomings*, 26 NOVA L. REV. 927, 939 (2002).

157. Bell, *supra* note 101, at 485.

158. Muhammad Ali Boxing Reform Act § 6307b. Definition of a coercive provision:

prevent promoters from having the ability to force boxers into long-term contracts as a condition of being granted a fight.<sup>159</sup>

Still, the Reform Act did not recognize illegal action when promoters urged boxers to enter into the coercive contracts; it simply made the contracts unenforceable.<sup>160</sup> Thus, the Reform Act is only effective when a boxer brings an issue to court, but history shows that boxers are generally reluctant to waste time and money on fruitless litigation.<sup>161</sup> Even though Congress intended the Reform Act to protect boxers, in certain circumstances it only attempts to "impede the business of promoters."<sup>162</sup>

### C. Free Agency in the Entertainment Industry

The acting business is different from the sport of MMA in many ways.<sup>163</sup> Still, actors and fighters are all involved in businesses that are driven by fan support and are plagued by one-sided agreements.<sup>164</sup> The struggle between actors and film production studios is representative of the dispute between MMA fighters and promoters because the relationships are both driven by coercive contracts.<sup>165</sup>

The contracting structure used by Hollywood film industry participants provides a model that could potentially redress the bargaining power

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[A] contract provision that grants any rights between a boxer and a promoter, or between promoters with respect to a boxer, if the boxer is required to grant such rights, or a boxer's promoter is required to grant such rights with respect to a boxer to another promoter, as a condition precedent to the boxer's participation in a professional boxing match against another boxer who is under contract to the promoter.

*Id.* § 6307b(a)(1)(B).

159. Groschel, *supra* note 156, at 940. Don King was notorious for presenting coercive contracts to fighters that he was not even promoting. See Varney, *supra* note 50, at 290. For example, in 1996 King forced boxer Evander Holyfield to sign a coercive agreement before he could fight World Boxing Association Heavyweight Champion Mike Tyson, who King was promoting. *Id.* The agreement gave King the rights to promote any challenger who won a championship belt from King's own fighter. *Id.* The Reform Act was meant to combat coercive contract terms such as this one, but it still would not completely prevent enforceability. *Id.* The Reform Act would only limit the provision to a term of one year in most circumstances. *Id.*

160. Groschel, *supra* note 156, at 941.

161. *Id.* at 941-42; see *supra* notes 151-52 and accompanying text.

162. Groschel, *supra* note 156, at 951.

163. Compare Smith, *supra* note 101, at 506-08 (describing the Hollywood bargaining structure), with discussion *supra* Section I.C (describing the basic structure of MMA and the UFC).

164. See Omar Anorga, Note, *Music Contracts Have Musicians Playing in the Key of Unconscionability*, 24 WHITTIER L. REV. 739, 740 (2003); Smith, *supra* note 101, at 506-07.

165. Smith, *supra* note 101, at 506-07.

disparities between MMA fighters and the UFC.<sup>166</sup> Bargaining disparities are commonplace in Hollywood because of the nature of the industry, which is similar in many ways to the MMA market.<sup>167</sup> Ten major production studios distribute fewer than half of the total number of films in Hollywood each year but still earn more than 95% of all box office revenue.<sup>168</sup> With over 98,000 actors competing for production projects, the major production studios, like the UFC, have vast power, and are selective in awarding contracts.<sup>169</sup>

Production studios had greater control over actors and actresses when Hollywood operated under the studio system.<sup>170</sup> Like the UFC's exclusive contract system, the studio system allowed studios to employ actors and actresses under long-term exclusive contracts.<sup>171</sup> As employees of a single studio, the stars only made movies for that studio, creating an economic incentive to make the star as famous as possible.<sup>172</sup> Production companies enjoyed enormous profits from the studio system because once the star was under contract his or her salary would stay the same even if he or she gained popularity from making movies.<sup>173</sup>

The studio system ended in 1944 when actress Olivia de Havilland sued her production studio.<sup>174</sup> Production studios used a number of extension provisions in their contracts that functioned like the Retirement Clause and Champion's Clause in a standard UFC contract.<sup>175</sup> For example, production studios interpreted contract terms as a period of actual service, rather than a term based on calendar years.<sup>176</sup> Thus, the studio based a one-year

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166. Connie Chang, *Can't Record Labels and Recording Artists All Just Get Along?: The Debate over California Labor Code § 2855 and Its Impact on the Music Industry*, 12 DEPAUL-LCA J. ART. & ENT. L. 13, 14-15 (2002) (discussing free agency in Hollywood and how it may be a solution to coercive contracts in other industries, namely the music industry).

167. Smith, *supra* note 101, at 506-07.

168. *Id.* at 506.

169. *Id.* at 506-07 (noting that the actors' union, called the Screen Actors Guild, has about 98,000 members but only admits a fraction of the total number of actors seeking employment in Hollywood).

170. Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, 116 HARV. L. REV. 2632, 2635 (2003).

171. James Surowiecki, *Hollywood's Star System, at a Cubicle Near You*, NEW YORKER (May 28, 2001), [http://www.newyorker.com/archive/2001/05/28/010528talk\\_the\\_financial\\_page](http://www.newyorker.com/archive/2001/05/28/010528talk_the_financial_page).

172. *Id.*

173. *Id.*

174. See Note, *supra* note 170, at 2634-35; Tracy C. Gardner, *Expanding the Rights of Recording Artists: An Argument to Repeal Section 2855(b) of the California Labor Code*, 72 BROOK. L. REV. 721, 729-30 (2007); Chang, *supra* note 166, at 18-19.

175. *De Haviland v. Warner Bros. Pictures*, 153 P.2d 983, 985 (Cal. Dist. Ct. App. 1944); see *supra* notes 69-84 and accompanying text.

176. *De Haviland*, 153 P.2d at 985.

contract on one year of actual work, which could actually take much longer than a single calendar year.<sup>177</sup> De Havilland signed a one-year contract with Warner Brothers, but the contract gave the studio the option to suspend the contract during periods of inactivity and extend it for six consecutive one-year terms.<sup>178</sup> Warner Brothers suspended de Havilland's contract for a total of twenty-five weeks.<sup>179</sup> The studio then exercised its extension option each time and claimed that de Havilland owed twenty-five weeks of service, even though the contract would have extended beyond seven calendar years since the time she signed the contract.<sup>180</sup> In *De Havilland v. Warner Bros. Pictures*, the court opined that California Labor Code Section 2855 did not allow personal service contracts to be extended beyond seven calendar years.<sup>181</sup> Citing age, health, and familial reasons, the court concluded that public policy required contracts for personal services be limited to seven calendar years.<sup>182</sup>

The court's interpretation of Section 2855, referred to as the "De Havilland Law," brought an end to the studio system and created the free agency system for actors and actresses in Hollywood.<sup>183</sup> Under the current free agency system, actors and actresses are not restricted to a long-term commitment with a single studio.<sup>184</sup> Instead, film stars are now able to sign new short-term contracts with any production company for each new project, giving them the "reasonable opportunity to receive fair-market compensation for their services."<sup>185</sup> In this new era, stars are able to negotiate new contracts with the studio of their choice with bargaining power based on their own true market value.<sup>186</sup>

The free agency system is less advantageous for the studios because they must renegotiate contracts for every new project.<sup>187</sup> Additionally, the studio will spend an enormous amount of money promoting a movie and increasing the popularity of an actor, while the actor will most likely work

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177. *Id.*

178. *Id.* at 984. The studio had the right to suspend de Havilland if she failed, refused, neglected to perform as instructed, or if production continued longer than expected. *Id.* De Havilland's contract was suspended a number of times when she was sick and when she in good faith refused roles that "were unsuited to her matured ability." *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 987.

182. *Id.* at 988. The court also noted that economic and social surroundings establish an expectation that "[a]s one grows more experienced and skillful there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation." *Id.*

183. See Note, *supra* note 170, at 2635.

184. *Id.* at 2650.

185. *Id.*

186. See Gardner, *supra* note 174, at 731.

187. See Surowiecki, *supra* note 171.

with a competing studio on his next project.<sup>188</sup> It appears that the free agency system was an overall victory for the stars in Hollywood.<sup>189</sup> On the other hand, free agency does not provide significant bargaining benefits for the average actors and actresses who are still trying to break into the industry.<sup>190</sup>

Disparities in bargaining power still exist in Hollywood because of the extremely large number of actors and actresses compared to the small number of major production studios.<sup>191</sup> Studios still consistently use “handshake deals,” which favor the studio over the star and offer the studio a way to back out of the deal without repercussion if the production cannot be completed.<sup>192</sup> Actors and actresses often have no choice but to accept such handshake deals because their reputation and ability to find work will suffer if they attempt to argue with the studio.<sup>193</sup> Even Hollywood superstars lack unlimited bargaining power because there is no guarantee that their name alone will create box-office success for a project.<sup>194</sup> While free agency was a step in the right direction, it did not sterilize the coercive nature of Hollywood contracts.<sup>195</sup>

#### D. Players’ Associations in American Football and Tennis

Many athletes in major sports have acquired representation through the use of collective bargaining agreements and players’ associations.<sup>196</sup> Collective bargaining agreements between players’ associations and league management are prevalent in team sports, such as American football, hockey, and basketball.<sup>197</sup> While most athletes in these sports use players’ associations to enter mutually beneficial agreements with management, profes-

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188. *Id.*

189. *See id.*

190. *See Smith, supra* note 101, at 507.

191. *See supra* notes 166-69 and accompanying text.

192. *See Smith, supra* note 101, at 508. Handshake deals are oral agreements to enter into a contractual relationship at a later point in time. *Id.* “Studios and producers have the financial incentive to remain uncommitted until *all* of the talent has committed, and view paying a particular artist off as a minimal cost in the event that they cancel a production.” *Id.* at 508-09 (footnotes omitted).

193. *Id.* at 509-10.

194. *Id.* at 510-11.

195. *See id.* at 511-12.

196. *See generally Collective Bargaining in Sports*, FORBES.COM, <http://video.forbes.com/fvn/sportsmoney/collective-bargaining-agreements> (last visited Oct. 5, 2012). Collective bargaining is defined as a “[m]ethod whereby representatives of employees (unions) and employers negotiate the conditions of employment, normally resulting in a written contract setting forth the wages, hours, and other conditions to be observed for a stipulated period.” *BLS Information: Glossary*, BUREAU LAB. STAT., <http://www.bls.gov/bls/glossary.htm#C> (last visited Oct. 5, 2012).

197. *See C. Peter Goplerud III, Collective Bargaining in the National Football League: A Historical and Comparative Analysis*, 4 VILL. SPORTS & ENT. L.J. 13, 13 (1997).



sional tennis players used their association to break away from management to achieve their desired goal.<sup>198</sup> Both models present possible alternatives that MMA fighters can pursue to prevent coercive UFC contracts.<sup>199</sup>

### 1. *The National Football League Players' Association*

An analysis of the collective bargaining agreements between players and league management in the National Football League (NFL) provides another potential method for combating coercive contracts. Before 1956, football players in the NFL did not have enough bargaining power to negotiate with league management.<sup>200</sup> Like fighters in the UFC, football players were forced to agree to contractual terms preferred by management.<sup>201</sup> The NFL used one-sided contracts containing provisions that allowed management to withhold salaries from injured players and prevent players from moving throughout the country.<sup>202</sup>

In an effort to gain representation, the football players formed an association in 1956 called the National Football League Players' Association (NFLPA).<sup>203</sup> Originally, management gave the new union little respect and instilled fear in the members.<sup>204</sup> The managers maintained the position that players were dispensable, like UFC fighters, and that the game would be played without anyone who went on strike.<sup>205</sup> As a result, members of the union were reluctant to act or make demands through the union, thereby allowing management to maintain a strong position.<sup>206</sup>

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198. See *id.*; see also *How It All Began*, *supra* note 101; Jonathan Snowden, *Combating the UFC Monopoly: Tennis as a Model for Organizing Fighters*, BLOODY ELBOW (Mar. 16, 2011, 7:29 PM), <http://www.bloodyelbow.com/2011/3/16/2053887/combating-the-ufc-monopoly-tennis-as-a-model-for-organizing-fighters>.

199. See generally Snowden, *supra* note 198.

200. Jeffrey F. Levine & Bram A. Maravent, *Fumbling Away the Season: Will the Expiration of the NFL-NFLPA CBA Result in the Loss of the 2011 Season?*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1419, 1431 (2010).

201. *Id.*

202. *Id.* at 1430-31.

203. *Id.* Creighton Miller was elected to lead the players in new collective bargaining efforts. *Id.* at 1431.

204. *Id.*

205. *Id.*

206. *Id.* In fact, the union did not gain any real bargaining power until the Supreme Court concluded that the NFL was not immune from antitrust charges. *Radovich v. Nat'l Football League*, 352 U.S. 445, 454 (1957). In *Radovich*, Bill Radovich, a nose guard for the Detroit Lions, brought a player lawsuit against the NFL claiming a breach of the Sherman Antitrust Act. *Id.* at 446-48. Radovich argued that the NFL committed a restraint of trade in violation of the Sherman Antitrust Act when the league refused to allow him move from Detroit to California to take care of an ill family member. *Id.* at 448-50. The NFL unsuccessfully argued that it was immune from antitrust litigation because the Supreme Court previously opined that Major League Baseball was exempt from the Sherman Antitrust Act. *Id.* at

Despite the organized structure of the NFLPA, a collective bargaining agreement did not exist until 1968.<sup>207</sup> One year later, the National Labor Relations Board (NLRB) accepted jurisdiction over professional sports to prevent unlawful labor practices in athletics.<sup>208</sup> Once authorities formally recognized the NFLPA as a union, it worked with league management to create a four-year agreement to increase minimum salaries for players, improve pension, and provide additional benefits.<sup>209</sup> The NFL lost subsequent antitrust litigation in 1976, costing the league millions of dollars.<sup>210</sup> These changes compelled the NFL to negotiate with the NFLPA and initiated a system that allowed players and teams to bargain for their contracts.<sup>211</sup>

Collective bargaining helps NFL players avoid both one-sided and coercive contracts with the league's owners.<sup>212</sup> The players' union designates a single representative to bargain on behalf of the football players in the league.<sup>213</sup> The National Labor Relations Act (NLRA) regulates the collective bargaining process.<sup>214</sup> Section 157 of the NLRA explains, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>215</sup> Inherent in the aforementioned provision is the requirement that those seeking to unionize are actual employees, as opposed to independent contractors.<sup>216</sup> Thus, once the em-

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451-54. This victory gave the union new bargaining power against the league. Levine & Maravent, *supra* note 200, at 1431.

207. Goplerud, *supra* note 197, at 14.

208. *Id.*

209. Wells, *supra* note 101, at 96.

210. See *Mackey v. Nat'l Football League*, 543 F.2d 606, 622-23 (8th Cir. 1976), *aff'g* 407 F. Supp. 1000 (D.C. Minn. 1975). This case involved a suit against the NFL to challenge the Rozelle Rule, which restricted player mobility. *Id.* at 610-11. The United States Court of Appeals for the Eighth Circuit decided that the Rozelle Rule violated federal antitrust law. *Id.* at 622.

211. Wells, *supra* note 101, at 97.

212. *Id.*

213. *Id.* at 103.

214. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006). The NLRA aims to prevent disparities in bargaining power by promoting "the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Id.* § 151.

215. *Id.* § 157.

216. Stephen S. Zashin, *Bodyslam from the Top Rope: Unequal Bargaining Power and Professional Wrestling's Failure to Unionize*, 12 U. MIAMI ENT. & SPORTS L. REV. 1, 23-24 (1995). Section 152(3) defines an employee as:

[A]ny employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor prac-

ployee requirement is satisfied, the collective bargaining structure creates a requirement for good faith bargaining between the two parties, and it has improved the once coercive nature of contracts in the NFL.<sup>217</sup>

## 2. *The Players' Association of Tennis Professionals*

Tennis and MMA share similar sport structures, and both have histories of coercive bargaining.<sup>218</sup> Both sports are structured around individuals competing against each other, unlike the NFL, which is made up of teams.<sup>219</sup> Further, the structures in tennis and MMA are made of a relatively small number of stars who generate the most revenue.<sup>220</sup> Beneath the most popular stars, the majority of the athletes struggle to establish themselves in the highly competitive ranking system.<sup>221</sup>

Tennis players endured problems with the original structure and governance of the sport.<sup>222</sup> Only amateurs were allowed to compete in tournaments around the world, and some of the game's top players became frustrated with their lack of control.<sup>223</sup> In 1972, the players met in a stairwell at a tournament venue and decided they needed to form a players' association.<sup>224</sup> The formation of the Association of Tennis Professionals (ATP) gave the players actual representation on the Men's Tennis Council (MTC), which administered the men's circuit.<sup>225</sup> The actions taken during this period of time brought about general improvements to the structure of the sport.<sup>226</sup>

Still, in 1988, members of the ATP recognized that the sport's governance was ignoring their input and that they were simply being used.<sup>227</sup> The players realized they "[had] no alternative but to organize [their] own

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tice . . . but shall not include . . . any individual having the status of an independent contractor.

29 U.S.C. § 152(3).

217. *Id.* § 158(a)(5); *see also* Wells, *supra* note 101, at 104. Collective bargaining is defined as "the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder." 29 U.S.C. § 158(d).

218. Snowden, *supra* note 198.

219. *Id.*

220. *Id.*

221. *Id.*

222. *See How It All Began, supra* note 101.

223. *See id.*

224. *Id.*

225. *Id.* The MTC was made up of representatives from the International Tennis Federation, the ATP, and other global tournament directors. *Id.*

226. *Id.* One such improvement was the introduction of a computer ranking system that would objectively create the best matchups between players. *Id.*

227. Snowden, *supra* note 198.

tour.”<sup>228</sup> The ATP announced it would pull away from the MTC and form its own tour, run completely by the players.<sup>229</sup> The ATP was able to convince an overwhelming majority of the top players to join the new tour, including eight of the top ten players in the world.<sup>230</sup> The players realized that they held enough popularity and star power to create their own successful tour.<sup>231</sup>

Many sports and industries have histories of coercive contracts between managers and the actual talent.<sup>232</sup> While some companies thrive on the power, others have been forced to change because the talent found a way to fight back and level the playing field.<sup>233</sup> It seems that MMA and the UFC are following the same path as many of the other sports and industries that have already dealt with the contract issue.<sup>234</sup> Thus, the UFC must change the way it presents contracts, or the fighters will be able to bring their own reform to the system.<sup>235</sup>

### III. ANALYZING ALTERNATIVE MODELS FOR MMA

If the UFC continues to use exploitative contracts, fighters will have numerous options to bring about contract reform.<sup>236</sup> The UFC has rightfully gained power and control over MMA as a result of its efforts to legitimize and popularize the sport throughout the world.<sup>237</sup> Still, fighters are beginning to contest the coercive UFC contract, which leads to the conclusion that some form of contract regulation is required to continue moving MMA in the right direction.<sup>238</sup> The potential mechanisms for reform include: allowing the UFC to maintain absolute control by potentially bringing an antitrust claim; seeking federal regulation over coercive contracts; moving fighters into a free agency system; or forming a fighters’ association.<sup>239</sup>

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228. Jim Sarni, *Players Planning to Leave Council, Form New Circuit*, SUN SENTINEL, Aug. 31, 1988, [http://articles.sun-sentinel.com/1988-08-31/news/8802200368\\_1\\_atp-tennis-players-joeey-rive](http://articles.sun-sentinel.com/1988-08-31/news/8802200368_1_atp-tennis-players-joeey-rive) (quoting Hamilton Jordan, director of the ATP).

229. *How It All Began*, *supra* note 101.

230. Snowden, *supra* note 198.

231. Rex Bellamy, *VIEWS OF SPORT; Will Men's Tennis Finally Get Its House in Order?*, N.Y. TIMES, Nov. 27, 1988, <http://www.nytimes.com/1988/11/27/sports/views-of-sport-will-men-s-tennis-finally-get-its-house-in-order.html?pagewanted=all&src=pm>.

232. See discussion *supra* Part II.

233. See discussion *supra* Part II.

234. See discussion *supra* Part II.

235. See Snowden, *supra* note 198.

236. See discussion *supra* Part II.

237. See *supra* notes 37-48 and accompanying text.

238. See generally Leung, *supra* note 2.

239. See discussion *supra* Part I.

## A. Allowing the UFC to Maintain Absolute Control

The UFC currently exercises absolute control over its own fighters, but the company has grown so much that it essentially controls the majority of the MMA industry.<sup>240</sup> The current distribution of power is nearly identical to the way that NASCAR operates; therefore, following the NASCAR model would mean doing nothing to bring about reform.<sup>241</sup> Similar to Bill France and his family, Dana White and the other UFC owners exercise complete control over their fighters with little tolerance for opposition.<sup>242</sup> France and White even use the same rationale for their absolute control, explaining that they have the most knowledge about their respective sports and cannot afford to let someone with less expertise come on the scene and change what they are trying to do for the sport.<sup>243</sup> Also, NASCAR and the UFC operate their businesses similarly as they only promote and sanction events.<sup>244</sup> NASCAR does not own any of the cars, tracks, or drivers, just as the UFC does not own any of the fighters or the event venues.<sup>245</sup> Finally, the two corporations maintain control over their contracting parties through strikingly similar practices of intimidation and strict demand for cooperation.<sup>246</sup>

If the UFC continues to operate with such absolute control, fighters may be able to bring antitrust suits like the few NASCAR drivers that tried to do so in the past.<sup>247</sup> In fact, similar to the potential antitrust claims that could be brought against NASCAR, a Las Vegas based culinary union recently attacked the UFC by accusing Zuffa of numerous antitrust violations.<sup>248</sup> Citing the UFC's acquisition of rival organizations and its contrac-

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240. See De La Rosa, *supra* note 51.

241. See discussion *supra* Section II.A.

242. See *supra* notes 51-53 and accompanying text.

243. See Iole, *supra* note 4 (stating Dana White feels that fighters who want to argue over contractual provisions "don't understand what the UFC is trying to do for the sport"); Modric, *supra* note 101, at 162 (explaining how NASCAR uses its control to create "close finishes that generate fan interest," leading to increased corporate sponsorship and profitability).

244. See *supra* notes 102-06 and accompanying text.

245. Modric, *supra* note 101, at 161.

246. See *supra* notes 10-12, 103-06 and accompanying text.

247. See generally De La Rosa, *supra* note 51.

248. Bryanna Fissori, *Does UFC's Success Exceed Legal Boundaries? Culinary Union Requests FTC Investigation*, BOXING INSIDER (Sept. 2, 2011), <http://www.boxinginsider.com/headlines/does-ufcs-success-exceed-legal-boundaries-culinary-union-formally-requests-ftc-investigation>. The Culinary Union went after Zuffa to try to get to co-owners Frank and Lorenzo Fertitta, who own non-unionized Station Casinos. *Id.* The Union represents numerous restaurant and hotel workers and wants to organize the Station Casino employees. *Id.* The Culinary Union has been protesting the Fertitta's casinos because they are not unionized, and this was their first attempt to go after the owners through a different company. *Id.*; see also T.M., *Ultimate Trust-Busting Championship*, ECONOMIST (Oct. 7, 2011, 6:52 AM), <http://www.economist.com/blogs/gametheory/2011/10/comp> eti-

tual restraints on its fighters, the Culinary Workers Union–Local 226 requested a formal Federal Trade Commission (FTC) investigation for anti-competitive dealings.<sup>249</sup> In particular, the Union argued contractual provisions such as the Champion’s Clause, exclusive negotiation clauses, and the Ancillary Rights Agreements caused only anti-competitive dealings.<sup>250</sup> Though the FTC did not find any wrongdoing, it is clear that the UFC does not have the kind of control over potential legal claims enjoyed by NASCAR.<sup>251</sup> The UFC may be able to police its fighters and prevent them from bringing claims by threatening contract termination, but it is clear that the UFC does not have that degree of control over outside forces, such as the Culinary Union.<sup>252</sup> Unlike NASCAR, the UFC cannot rely solely on internal control to prevent potentially lethal legal claims.<sup>253</sup>

Similarly, if fighters allow the UFC to follow in the footsteps of NASCAR, they will not be able to find a way to increase representation and bargaining power.<sup>254</sup> Fighters have already recognized a need to gain representation, but if the UFC continues to gain power then there will be little to prevent it from thwarting the fighters’ attempts to organize, much like NASCAR.<sup>255</sup> Thus, if the UFC continues to operate like NASCAR, it will continue to exploit fighters, and those fighters will have no choice but to accept the UFC’s terms in every contractual provision, or else they simply will not be given the chance to fight.<sup>256</sup>

Depending on one’s viewpoint, strict control on the part of the UFC may have potential benefits.<sup>257</sup> Clearly, as Dana White has stated numerous

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tion-mixed-martial-arts (discussing the Culinary Union and its attempts to launch an antitrust investigation and prevent New York from sanctioning MMA); *Culinary Union Accuses UFC of “Homophobic” Behaviour*, FIGHTERS ONLY (Oct. 13, 2011), <http://www.fightersonlymag.com/content/news/13959-culinary-union-accuses-ufc-of-homophobic-behaviour> (explaining the Union has taken steps to prove “the UFC product is of dubious moral quality” by launching a cite that highlights “expletive-heavy quotes” from UFC figures, and attempts to show that the UFC promotes homophobic tendencies based on similar quotes).

249. Fissori, *supra* note 248.

250. *Id.* The FTC ended its investigation in January 2012 after finding no wrongdoing on the part of Zuffa. Steven Marrocco, *FTC Closes Investigation into UFC/Strikeforce Deal*, MMAJUNKIE.COM (Jan. 31, 2012, 8:00 PM), <http://mmajunkie.com/news/27219/ftc-closes-investigation-into-ufcstrikeforce-deal.mma>. A letter sent to Zuffa lawyers explained that no further action was required, but the FTC “reserve[d] the right to take such further action as the public interest may require.” *Id.* (quoting letter from FTC Secretary Donald S. Clark to lawyers representing Zuffa and Explosion Entertainment).

251. See *supra* notes 107-09 and accompanying text.

252. See Marrocco, *supra* note 250.

253. See *supra* notes 117-19 and accompanying text.

254. See discussion *supra* Section II.A.

255. See *supra* notes 110-16 and accompanying text.

256. See *supra* notes 102-06 and accompanying text.

257. See *supra* notes 14-17 and accompanying text.

times, the UFC knows what it is doing and it knows what action is necessary to help MMA grow.<sup>258</sup> The UFC is much like NASCAR in that it has made amazing and historic improvements to the sport, and that the UFC is far from finished with bringing MMA to the global main stage.<sup>259</sup> If the UFC continued on its path of ultimate control, the sport would go in the direction that the owners want it to go, much like NASCAR.<sup>260</sup> Fans would be happy because they could watch an unlimited number of high-quality fights.<sup>261</sup>

Nonetheless, absolute control would not be good for the sport as a whole because the UFC is still a business.<sup>262</sup> Thus, the UFC will not always match up the best fighters if they will not draw a large crowd.<sup>263</sup> Rather, as a business the UFC must promote fights that will generate the most revenue.<sup>264</sup> Ethics is the essence of sport, and rules are designed to level the playing field to showcase the human body and mind at their finest.<sup>265</sup> If the UFC continues to exploit its fighters, it will harm the ethics of the sport and, thus, the sport overall.<sup>266</sup>

## B. Waiting for Congressional Action

Many MMA figures have expressed the opinion that the sport can, and should, be regulated under the Muhammad Ali Boxing Reform Act or similar congressional action.<sup>267</sup> Congress would likely have the constitutional authority to regulate the sport in accordance with its powers granted by the Commerce Clause.<sup>268</sup> Further, the basic frameworks of boxing and MMA, and the Reform Act itself, make it a viable method for attempting to reform

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258. See *supra* notes 14-17 and accompanying text.

259. See *supra* notes 44-48 and accompanying text.

260. See discussion *supra* Section II.A.

261. See *supra* notes 44-48 and accompanying text.

262. See discussion *supra* Section I.C.

263. See FIGHTING POLITICS, *supra* note 44.

264. *Id.*

265. The sport of boxing is a perfect example of what happens when ethics are ignored and corruption takes over. See discussion *supra* Section II.B. The sport has become more irrelevant for a number of reasons, and “[s]o-called major fights are being watched by well under 1% of the country.” James Foley, *Boxing Enters Somewhere Behind Golf: Fixing the Sweet Science’s Irrelevance in the American Sports Culture*, BAD LEFT HOOK (Feb. 14, 2012, 9:52 PM), <http://www.badlefthook.com/2012/2/14/2798986/boxing-american-mainstream-sports-culture-analysis>.

266. See generally discussion *supra* Part I.

267. See Varney, *supra* note 50, at 295-96 (noting how various MMA figures realize that the Reform Act does not currently apply to their contracts, but it will at some point in the future).

268. U.S. CONST. art. I, § 8; Michael R. Daum, *Intelligent Defense: A Call for Federal Regulation of Mixed Martial Arts*, 21 SETON HALL J. SPORTS & ENT. L. 247, 265-66 (2011).

MMA contracts.<sup>269</sup> Although the Reform Act was enacted to combat coercive contracts solely in the sport of boxing, minor changes, or a liberal interpretation of ambiguities in the statute, provide an example of how congressional action can reform MMA contracts between fighters and promoters.<sup>270</sup>

Boxing and MMA share a number of similarities that help draw the conclusion that the Reform Act should apply to both sports.<sup>271</sup> The UFC's continued growth and acquisitions of rival companies have resulted in increased scrutiny once placed on boxing promoters.<sup>272</sup> Similarly, Congress enacted the Reform Act specifically to police boxing contracts and to keep out many of the coercive provisions that now appear in MMA contracts.<sup>273</sup>

The Reform Act does not explicitly cover MMA because the sport did not gain popularity in America until after Congress passed the Act in 2000.<sup>274</sup> Therefore, the Reform Act does not automatically apply to MMA simply because of the similarities between the two sports.<sup>275</sup> In fact, in 2008 the UFC hired a lobbying firm to advocate against applying the Reform Act to the sport, arguing that Congress did not consider the MMA when the Act was passed.<sup>276</sup> If UFC fighters push for reform, it would not take much to change the language of the Reform Act to apply it to MMA contracts.<sup>277</sup>

Applying the Reform Act to MMA would be a step in the right direction toward preventing coercive contracts, but that step alone is not likely to be enough.<sup>278</sup> As it stands now, the Reform Act provides a basic framework for what a fair contract should look like, but boxers seeking redress rarely invoke its power.<sup>279</sup> The fact remains that the Reform Act does not act as a sword to combat illegal contracts; it merely acts as a shield to prevent coer-

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269. See discussion *supra* Section II.B.

270. Sam Caplan, *Mark Cuban Expounds on Ali Act*, FIVE OUNCES OF PAIN (Jan. 31, 2008), <http://www.fiveouncesofpain.com/2008/01/31/mark-cuban-expounds-on-ali-act>.

271. See discussion *supra* Section II.B.

272. Chris Howie, *UFC May Be Subject of FTC Anti-Trust Investigation*, MMABAY NEWS (Oct. 18, 2011), <http://mmabaynews.com/tag/muhammad-ali-boxing-reform-act>.

273. See discussion *supra* Section II.B.

274. See generally Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6301 (2006).

275. See T.M., *supra* note 248.

276. See Kim Chi Ha, *Ultimate Fighting Hires Lobbying Firm*, HILL (May 27, 2008, 1:45 PM), <http://thehill.com/business-a-lobbying/3616-ultimate-fighting-hires-lobbying-firm>. Brownstein Hyatt Farber Schreck lobbyist Makan Delrahim argues, "Sometimes those types of laws can become vehicles for other things, affecting other sports." *Id.* He explains that MMA is different from boxing and was not taken into consideration when the Reform Act was enacted, so it "wouldn't make sense to apply the same rules." *Id.*

277. See T.M., *supra* note 248; see also Varney, *supra* note 50, at 296-99 (giving a strong example of what the Reform Act might look like should it be altered to include reference to MMA).

278. See Varney, *supra* note 50, at 304-05.

279. See *id.*



cive boxing contracts from being enforced.<sup>280</sup> The main issue is that fighters would still have to spend time and money on litigation if they wanted to seek redress through an “MMA Reform Act.”<sup>281</sup>

Similarly, the Reform Act probably would not even prevent many of the problems that fighters run into when dealing with coercive contracts.<sup>282</sup> Fighters have a number of alternatives if they want to fight outside of the UFC, but it is clear that the UFC holds the largest amount of competition and the greatest chance to achieve success.<sup>283</sup> Therefore, the UFC does not necessarily need to enforce its contracts to make fighters perform because the threat of termination alone is enough to make the fighter submit.<sup>284</sup> For example, applying the Reform Act would not prevent another fighter like Jon Fitch from signing the Ancillary Rights Agreement, because the termination of his contract was enough to make him realize he could not keep his job if he did not follow the demands of the UFC.<sup>285</sup>

On the other hand, the Reform Act would likely force the UFC to make some changes to its current standard form contract.<sup>286</sup> For instance, under Section 6307b(a)(1)(B) of the Reform Act, it is likely that a court will find the Retirement Clause and Champion’s Clause coercive because they grant “rights between a [fighter] and a promoter . . . as a condition precedent to the [fighter’s] participation in a professional [MMA event].”<sup>287</sup> Thus, the two clauses would be “considered to be in restraint of trade, contrary to public policy, and unenforceable” if the extension provisions were for a period greater than one year.<sup>288</sup> Still, there is no guarantee that the Reform Act would prevent the list of other issues that fighters must deal with.<sup>289</sup>

### C. Creating a Free Agency System

At this point, the UFC uses its own version of the Hollywood studio system to develop fighters and profit off of them as much as possible.<sup>290</sup> The various extension clauses within UFC contracts are somewhat similar to the provisions that allowed production companies to extend contract terms be-

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280. See discussion *supra* Section II.B.

281. See discussion *supra* Section II.B.

282. See discussion *supra* Section I.C.

283. See discussion *supra* Section I.B.

284. See *supra* Introduction.

285. See *supra* Introduction.

286. See Varney, *supra* note 50, at 296-99.

287. Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6307b(a)(1)(B) (2006); see also Varney, *supra* note 50, at 289-90.

288. 15 U.S.C. § 6307b(a)(1)(A).

289. See discussion *supra* Section I.C.

290. See discussion *supra* Section II.C.

yond what was actually agreed upon.<sup>291</sup> If a court were to decide that provisions such as the Retirement Clause and the Champion's Clause could not be used to extend the term indefinitely, the result might resemble the effect that the De Havilland Law had on the studio system.<sup>292</sup> If a similar law applied to MMA contracts, the effect of the application would be to create a free agency system that allows fighters to sign with different promotion companies once the agreed upon term expires.<sup>293</sup>

There are some major differences between the structure of MMA and the structure in Hollywood entertainment.<sup>294</sup> First, a single project in Hollywood can take years to complete, whereas a single MMA event will take place in one night.<sup>295</sup> Thus, it is more realistic for actors and actresses to have the freedom to sign with a different production company after the completion of each project.<sup>296</sup> Also, there are a limited number of powerful production companies in Hollywood, but there are no promotion companies as powerful as the UFC.<sup>297</sup> Therefore, fighters do not have a true incentive to sign with different promotion companies after each event because the UFC is more dominant than any of the other companies.<sup>298</sup> Finally, unlike in Hollywood, the MMA industry functions by giving fighters the chance to win a championship belt in their respective weight class.<sup>299</sup> If fighters were free to move among promotion companies, the entire system would be in jeopardy and it would be difficult to monitor all of the different championships in every league.<sup>300</sup>

The reality is likely that a strict application of the free agency model would not function in the MMA industry.<sup>301</sup> First, if fighters could renegotiate or sign with different companies before the UFC has profited from the fighters, then the entire industry would be threatened because promotion companies would not have an incentive to promote fighters who do not sign contracts with longer terms.<sup>302</sup> Also, the free agency model might have the

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291. See discussion *supra* Section II.C.

292. See discussion *supra* Section II.C.

293. See discussion *supra* Section II.C.

294. Compare *supra* Section I.C (describing UFC contracts), with *supra* Section II.C (describing contracts in Hollywood).

295. See generally discussion *supra* Section I.B (discussing UFC Pay-Per-View events).

296. See Note, *supra* note 170, at 2635.

297. See discussion *supra* Sections I.B, II.C.

298. See discussion *supra* Section I.C.

299. See generally notes 69-76 and accompanying text.

300. This is the same problem that is present in the sport of boxing. See Groschel, *supra* note 156, at 934-35. The sport uses a number of different sanctioning organizations that create a number of different champions for a single weight class. *Id.* Thus, many believe that the sport is difficult to follow and the sanctioning organizations are to blame. *Id.*

301. See *supra* notes 294-300 and accompanying text.

302. See *supra* notes 13-15 and accompanying text.

same effect as it did in Hollywood by placing a bigger emphasis on star power and making it even more difficult for new fighters to break into the sport.<sup>303</sup>

The free agency model could only work if its function was to limit the extension clauses that appear in UFC contracts.<sup>304</sup> At this point, the extension clauses are the only provisions that could keep a fighter from signing with another promotion company once his contract ends with the UFC.<sup>305</sup> Thus, if the UFC wanted to keep the fighter after his contract expired, it would have to renegotiate with the fighter, as opposed to enforcing a provision that forces the fighter to stay.<sup>306</sup> As a result, fighters would then have more bargaining power based on their market value, and they could go wherever they found the best deal, without the fear of being trapped by extension provisions.<sup>307</sup>

On its face, it appears that the free agency system would not be an appropriate replacement for the current MMA studio system.<sup>308</sup> Because the UFC is the most elite MMA promotion company in the industry, most fighters would not consider fighting for a different company.<sup>309</sup> Therefore, a free agency model would not create the equality in bargaining power desired by the fighters.<sup>310</sup> Even if a fighter had the ability to bargain with any company based on his marketability, the majority of the most successful fighters would stay with the UFC because it has the best competition.<sup>311</sup> Free agency would give the UFC little incentive to change its contractual provisions, and it would be reluctant to sign anyone for a single fight to increase his popularity so he can fight with a different promotion the next time.<sup>312</sup>

#### D. Forming a Fighters' Association

Perhaps the most viable option for curing bargaining disparities in the world of MMA is to follow in the steps of the NFL or the ATP and form a fighters' association.<sup>313</sup> As one of the most common methods to combat bargaining disparities, creating a players' association is widely accepted in the sporting world.<sup>314</sup> To gain union protection like the NFLPA, fighters

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303. See discussion *supra* Section II.C.

304. See discussion *supra* Section I.C.

305. See discussion *supra* Section I.C.

306. See discussion *supra* Section I.C.

307. See discussion *supra* Section I.C.

308. See *supra* notes 301-03 and accompanying text.

309. See discussion *supra* Section I.B.

310. See discussion *supra* Section I.C.

311. See discussion *supra* Section I.B.

312. See *supra* notes 301-03 and accompanying text.

313. See discussion *supra* Section II.D.

314. See *supra* notes 196-99 and accompanying text.

would be required to prove that they are considered employees, rather than individual contractors.<sup>315</sup> On the other hand, fighters could follow the radical step that the ATP took and create their own promotion.<sup>316</sup> To be successful with that option, fighters would need unity and star power.<sup>317</sup> Unfortunately, creating their own promotion would take a tremendous amount of time because the UFC owns the likeness of the fighters who are under contract.<sup>318</sup>

### 1. *The Fighters' Union*

As stated above, the structures of football and MMA share a number of dissimilarities.<sup>319</sup> For example, the team structure in the NFL made it much more reasonable for football players to create a union than it would be in MMA because the sport is based on individuals.<sup>320</sup> Also, fighters would need to overcome the big hurdle of classifying themselves as UFC employees.<sup>321</sup> Some of the most important factors to consider when determining the fighters' employment status are control over the right to work in the service of another and the terms of the contract.<sup>322</sup>

Employee status may be determined based on the amount of control the employer has over the contracting party; thus an agreement to work exclusively for the single employer indicates employee status.<sup>323</sup> As evidenced by the exclusivity provision in the exclusive fighter agreements, the UFC maintains complete control over its fighters and refuses to let them fight for other promotion companies.<sup>324</sup> The UFC exerts so much control in this aspect of the employment relationship that it even extends its exclusivity provision if a fighter retires prematurely.<sup>325</sup> Though not dispositive, the use of an exclusivity provision in an employment contract provides evidence that the contracting party is an employee instead of an independent contractor.<sup>326</sup>

The terms of the contract and relationship between the parties provide extremely relevant evidence as to whether the contracting party is seen as an

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315. Zashin, *supra* note 216, at 23.

316. See discussion *supra* Subsection II.D.2.

317. See discussion *supra* Subsection II.D.2.

318. See *supra* notes 85-91 and accompanying text.

319. See discussion *supra* Subsection II.D.1.

320. Marrocco, *supra* note 97. Co-owner Lorenzo Fertitta explained, "They have different needs and are (at) different times in their careers, so I'm not sure if [a union] works." *Id.*

321. See *supra* notes 212-16 and accompanying text.

322. See Zashin, *supra* note 216, at 28 (listing factors relevant to employment status as adopted from *Restatement (Second) of Agency* § 220(2) (1958) and *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968)).

323. *Id.* at 42.

324. See discussion *supra* Section I.C.

325. See *supra* notes 77-84 and accompanying text.

326. See Zashin, *supra* note 216, at 43.

employee or independent contractor.<sup>327</sup> Regardless of the label that is placed on the contracting party in the terms of the contract, courts will still use the entirety of the relationship to determine employment status.<sup>328</sup> In terms of the standard Zuffa contract, it is likely that the court would be more concerned with the overall control that the promotion company exerts over the fighters rather than a label that is spelled out in the contract.<sup>329</sup> Based on the totality of the contractual relationship, it seems that a court could consider fighters to be employees rather than independent contractors.<sup>330</sup>

In the sporting world, unionizing is the most widely accepted method of equalizing bargaining power among employers and employees, but it is still not a perfect solution.<sup>331</sup> Various legal issues and problems arise once a group of athletes forms a union.<sup>332</sup> The inevitable players' strike is often the most obvious and frustrating downside to unionization because it affects the players, owners, and fans.<sup>333</sup> Unionizing may not be a perfect solution, but a fighters' union may be the best solution to the current bargaining disparities amongst the fighters and owners of the promotion companies because it would allow fighters to make their own demands and finally earn representation.<sup>334</sup>

## *2. The Fighters' Rebellion*

The various similarities between MMA and tennis make the ATP model an intriguing solution for giving fighters the power to prevent coercive contracts.<sup>335</sup> If the fighters formed their own association, they would not need to immediately take the drastic measures taken by the ATP.<sup>336</sup> Instead, the new fighters' association could function like the early ATP and work in conjunction with UFC management to make improvements to the overall structure and underlying problematic contractual issues.<sup>337</sup> If the fighters' association found that the UFC continued to fail to make important changes, then it could take action like the ATP and form its own promotion, based on fighters' needs.<sup>338</sup>

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327. *Id.* at 46-47.

328. *See id.*

329. *See id.*

330. *See supra* notes 212-16 and accompanying text.

331. *See discussion supra* Subsection II.D.1.

332. *See discussion supra* Subsection II.D.1.

333. *See supra* note 196 and accompanying text.

334. *See discussion supra* Subsection II.D.1.

335. *See supra* notes 218-21 and accompanying text.

336. *See discussion supra* Subsection II.D.2.

337. *See discussion supra* Subsection II.D.2.

338. *See discussion supra* Subsection II.D.2.

There are potential problems and other considerations that need to be considered with this model. As addressed above, the most important issue in forming a fighters' association is fighter unity.<sup>339</sup> The fighters would need a lot of support and a lot of big name fighters to join the association if they want bargaining power like the ATP.<sup>340</sup> Also, there is no guarantee that the sport should go in the direction chosen by the fighters.<sup>341</sup> The UFC has been extremely effective in its efforts to legitimize the sport, and it has a clear plan for continuing to expand and improve the sport.<sup>342</sup> There is no way to know how the fighters would change the sport if the power is placed in their hands, but there may be enough experienced and well-respected fighters that would know what must be done to improve the UFC's shortcomings.<sup>343</sup>

If the fighters were able to unify and create their own association, it would likely give them the most amount of bargaining power out of all available options.<sup>344</sup> The UFC would have to sit down and work with the fighters as a group, or else it would risk the possibility of losing all of their talents.<sup>345</sup> Currently, there is enough star power in the UFC to make the possibility of a separate fighters' promotion company a legitimate threat.<sup>346</sup> After all, the UFC would have to realize that "[y]ou cannot promote big tournaments without big names."<sup>347</sup>

### CONCLUSION

As MMA continues to increase in popularity, fighters will likely continue to adapt and improve.<sup>348</sup> Keeping this in mind, promoters must be willing to evolve to meet the fighters' needs or else they face the risk of being taken over by the fighters.<sup>349</sup> The most radical and effective way to bring

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339. See Marrocco, *supra* note 97.

340. *Id.* Fighter Matt Lindland explained, "The fighters [are] all whores; they just fight for the biggest purse, and it's going to be tough unless you could somehow get all the fighters to agree to something like that." *Id.* (alteration in original). He also went on to state, "There's enough support (for a union), but these guys outside of the cage or outside of the ropes are cowards. You know they would not dare stand up to the powers-that-be." *Id.*

341. See discussion *supra* Part I.

342. See discussion *supra* Section I.B.

343. For example, Randy Couture's name constantly comes up in discussions about leaders for a potential fighters' association. See *Should There Be a Fighter's Union?*, MMA PAYOUT (Apr. 27, 2011), <http://mmapayout.com/2011/04/should-there-be-a-fighters-union>. Couture is a well-respected, hall of fame fighter who has felt the wrath of the UFC contract. See *id.* He would likely be very persuasive and influential in the role as leader of a fighters' association. See *id.*

344. See *supra* notes 335-43 and accompanying text.

345. See *supra* notes 335-43 and accompanying text.

346. See discussion *supra* Section I.B.

347. Bellamy, *supra* note 231.

348. See discussion *supra* Part I.

349. See discussion *supra* Part III.

about change is for the fighters to unify into an association and force the UFC to listen to their demands or risk losing their talents.<sup>350</sup> On the other hand, the UFC could take its own steps toward assuring that its contracts conform to appropriate standards set forth by other sports and industries.<sup>351</sup> Either way, the UFC needs to loosen the chokehold on its fighters because history shows that it cannot hang on forever without someone starting to fight back.<sup>352</sup>

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350. See discussion *supra* Section III.D.

351. See discussion *supra* Part II.

352. See discussion *supra* Part II.